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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 807. 45

THE LEATHER MANUFACTURER'S NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

EDMOND CHARLES MORGAN, WILLIAM THOMAS BERNERS, AND THOMAS PERCY FOX.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 6, 1882.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 307.

THE LEATHER MANUFACTURER'S NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

EDMOND CHARLES MORGAN, WILLIAM THOMAS BERNERS, AND THOMAS PERCY FOX.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court holden in and for the southern district of New York, Greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, or some of you, between Edmond Charles Morgan, William Thomas Berners, and Thomas Percy Fox, plaintiffs, and the Leather Manufacturers' National Bank, defendant, in a plea of trespass on the case upon promises, a manifest error has intervened, to the great damage of the said Leather Manufacturers' National Bank, as in its complaint has been stated. And as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are commanded that, if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the Chief Justice and Associate Justices of the Supreme Court of the United States, on the second Monday of October next, at Washington, being the present seat of the National Gov-
2 ernment, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, at Washington aforesaid, this 29th day of April, in the year of our Lord one thousand eight hundred and eighty-two and of the Independence of the United States the one hundred and sixth.

[SEAL.] JOSEPH M. DEUEL, *Clerk.*

The foregoing writ is allowed, Apr. 29, 1882.

A. BELESON BROWN, *U. S. D. J.*

3 (Endorsed:) U. S. circuit court, southern district of New York. Edmond Charles Morgan *et als. against* The Leather Manufacturers' National Bank. Writ of error. N. B. Sanborn defendant's attorney, 29 Wall street, New York city. Due and timely service of a copy of the within writ of error is hereby admitted. Dated April 29, 1882. Platt & Bower, att'ys pl'ffs & resp'd'ts. U. S. circuit court. Filed May 2, 1882. Joseph M. Deuel, clerk.

UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

I, Joseph M. Deuel, clerk of the circuit court of the United States for the southern district of New York, in the second circuit,
4 by virtue of the foregoing writ of error, and in obedience thereto, I hereby certify that the following pages, numbered from five to one hundred and seventeen, inclusive, contain a true and complete transcript of the records and proceedings had in said — in the case of The Leather Manufacturers' National Bank, plain-

tiff in error, against Edmond Charles Morgan, William Thomas Berners, and Thomas Percy Fox, defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this fourth day of October, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh.

[SEAL.] JOSEPH M. DEUEL, *Clerk.*

5 U. S. Circuit Court, S. D. of New York.

EDMOND CHARLES MORGAN & others
against
THE LEATHER MANUFACTURERS' NATIONAL BANK.

JOSEPH M. DEUEL, Esq.,
Clerk of U. S. Circuit Court, S. D. of New York:

The plaintiffs pray that a summons issue in the above-entitled action.

New York, April 11, 1881.

Yours, &c., PLATT, GERARD & BOWERS,
Pl'ffs' Att'ys.

6 [Endorsed:] U. S. circ't c't., S. D. of N. Y. Morgan & o'rs *vs.* Leather M'f'rs' Nat. B'k. Platt, Gerard & Bowers, pl'ffs' att'ys. U. S. circuit court. Filed Apr. 11, 1881. Joseph M. Deuel, clerk.

7 U. S. Circuit Court for the Southern District of New York.

EDMOND CHARLES MORGAN, WILLIAM THOMAS BERNERS, and THOMAS PERCY FOX
against
THE LEATHER MANUFACTURERS' NATIONAL BANK.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New York, this

11th day of April, in the year one thousand eight hundred and eighty-one.

8 [L. S.] JOSEPH M. DEUEL, *Clerk.*

PLATT, GERARD & BOWERS,
Plaintiff's Attorneys.

Office and post office address, 54 William st., N. Y. city, New York.

9 [Endorsed:] U. S. circuit court, S. D. of New York. Morgan *et al. vs.* The Leather M'f'rs' Nat. B'k. Summons. Platt, Gerard & Bowers, pl'ffs' att'ys. I hereby certify that on the 12th day of April, 1881, at the city of New York, in my district, I personally served the within summons upon the within-named, The Leather Manufacturers' National Bank, by exhibiting to David L. Colden, cashier of said bank, the within original, and at the same time leaving with him a copy thereof, and at the same time & place leaving with him a copy of bill of complaint, dated May 19th, 1881. Louis F. Payn, U. S. marshal, S. D., N. Y. U. S. circuit court. Filed May 20, 1881. Joseph M. Deuel, clerk.

10 Circuit Court of the United States of America, in the Second Circuit for the Southern District of New York.

EDMOND CHARLES MORGAN, WILLIAM THOMAS BERNERS, and THOMAS PERCY FOX, Plaintiffs,
ag'st
THE LEATHER MANUFACTRERS' NATIONAL BANK, Defendant.

Edmond Charles Morgan, William Thomas Berners, and Thomas Percy Fox, who are all aliens and citizens of the Kingdom of Great Britain, plaintiffs in this suit, by Platt, Gerard & Bowers, their attorneys, complain by this their amended complaint of the Leather Manufacturers' National Bank, which is a corparation duly created by and existing under the laws of the United States of America, and having its place of business at the city of New York, and within said distrit, for that whereas plaintiffs were at all times hereinafter mentioned, and still are, copartners carrying on busi-

11 ness under the firm name of Ashburner & Co., and had, prior to the eighth day of April, eighteen hundred and eighty-one, opened a bank account with the defendant, which account was kept under the name of "Wm. B. Cooper, junior, agent for Ashburner & Co.," and in the usual course of business deposited money with the defendant, and drew on the same by checks in the usual form. That after deducting all payments made by the defendant to these plaintiffs, or for their use, and all the charges which it was entitled to charge against them, there remained a balance of the monies of said plaintiffs in the hands of said defendant, which it had received and held to said plaintiff's use on the eighth day of April, eighteen hundred and eighty-one, nine thousand nine hundred and ninety-six 38-100 dollars, in which sum the said defendant was, on the day last-mentioned, indebted to the plaintiffs.

That on the said eighth day of April, eighteen hundred and eighty-one, these plaintiffs duly drew and presented a check for the
12 aforesaid balance to the said defendant, and demanded payment thereof, which the defendant wholly refused. And the said plaintiffs by their said attorneys, and for a further cause of action, complain of the defendant, for that whereas on the twenty-fifth day of August, in the year eighteen hundred and eighty, they were the owners and holders of a certain instrument in writing, commonly called a bank check, for two hundred and eighty $\frac{97}{100}$ dollars, drawn and payable to the order of these plaintiffs, which they duly endorsed in writing for deposit to the credit of the account of these plaintiffs with said defendant, whereby notice was given that the same was endorsed for such deposit, and for such deposit only, and yet notwithstanding such endorsement and notice, the defendant obtained possession thereof without plaintiff's knowledge or consent, and collected and received the amount thereof, and neglected and refused, and still neglects and refuses, to credit the plaintiffs therewith in their said account, or pay the same over to them, to their damage in the sum of two hundred and eighty $\frac{97}{100}$ dollars.

13 That said defendant, though often requested so to do, has not paid the said balance above mentioned, nor any part thereof, to the plaintiffs, but has hitherto neglected and refused and still neglects and refuses so to do, to the damage of the plaintiffs in the sum of ten thousand two hundred and seventy-seven $\frac{35}{100}$ dollars.

Whereupon the plaintiffs bring this suit and demand judgment for the sum of ten thousand two hundred and seventy-seven $\frac{35}{100}$ dollars, with interest on said sum from the eighth day of April, eighteen hundred and eighty-one.

PLATT, GERARD & BOWERS,
Attorneys for Plaintiffs.

STATE OF NEW YORK, }
City and County of New York, } *ss.*:

William B. Cooper, Junior, being duly sworn, deposes and says: That he is the agent and attorney-in-fact for the plaintiffs in this action; that he has read the foregoing amended complaint and knows the contents thereof; that the same is true of his own
14 knowledge, except as to the matter therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. That the reason this verification is not made by the plaintiffs, or one of them, is because they are not within this county, where deponent resides, and that all the material allegations of the pleading are within the personal knowledge of deponent.

W. B. COOPER, JR.

Sworn to before me, this 9th day of May, 1881.

HENRY C. BOWERS,
Notary Public, N. Y. Co.

15 [Endorsed:] U. S. circuit court. Edmond Charles Morgan & *als.* ag'st The Leather Manufacturers' National Bank.

Amended complaint. Platt, Gerard & Bowers, att'ys for pl'ff, 54 William St. U. S. circuit court. Filed May 11, 1881. Joseph M. Deuel, clerk.

Circuit Court of the United States of America, in the Second Circuit, for the Southern District of New York.

EDMOND CHARLES MORGAN, WILLIAM THOMAS BERNERS, and THOMAS PERCY FOY, Plaintiffs,

against

THE LEATHER MANUFACTURERS' NATIONAL BANK OF NEW YORK, Defendant.

And the said, The Leather Manufacturers' National Bank of New York, defendants in the suit, by N. B. Sanborn, its attorney, comes and defends the wrong and injury alleged in the amended complaint herein, and, answering the cause of action alleged in the first three folios of the said amended complaint, says that it admits that it is a corporation incorporated and having its place of business as in the said amended complaint alleged, and that prior to the eighth day of April, 1881, William B. Cooper, Junior, as agent for the
17 firm of Ashburner & Co., opened a bank account with it under the name of William B. Cooper, Junior, agent for Ashburner & Co., but this defendant alleges that it has no knowledge or information sufficient to form a belief as to who constituted or constitute the firm of Ashburner & Co., or whether or not the plaintiffs herein constitute such firm, and it therefore leaves the said plaintiffs to make such proof as to the allegations in that behalf in the said amended complaint contained as they may be advised.

And further answering, and on information and belief, it admits and alleges that prior to the fourteenth day of August, 1880, Willliam B. Cooper, Junior, as agent for Ashburner & Co., opened a bank account with this defendant, which account was kept under the name of William B. Cooper, Junior, agent for Ashburner & Co., and that the said Cooper, as such agent, in the usual course of business deposited money with this defendant and drew on the same by checks in the usual form, but it denies that after deducting all payments
18 made by this defendant to the said William B. Cooper, Junior, as such agent, or on his order or for his use, and all the charges which this defendant was entitled to charge against the said Cooper as such agent, there remained on the eighth day of April, 1881, a balance of the monies of the said plaintiffs, or of the said Cooper, as such agent, in the hands of this defendant, which it had received and held to their or his use, amounting to the sum of nine thousand nine hundred and ninety-six $\frac{3}{100}$ dollars, or any sum other or greater than the sum of one hundred and forty-one $\frac{91}{100}$ dollars, and it denies that on the said day it was or now is indebted to the said plaintiffs, or to the said Cooper, as such agent, in the sum of nine thousand nine hundred and ninety-six $\frac{3}{100}$ dollars, or in any sum other or greater than the said sum of one hunded and forty-one $\frac{91}{100}$ dollars; and this defendant, further answering, alleges,

on information and belief, that prior to and since the
19 fourteenth day of August, 1880, the said William B. Cooper, Junior, as such agent, as aforesaid, kept an account with this defendant, and deposited with this defendant from time to time sums of money, and from time to time drew out money so deposited by checks in the usual form, signed by him as such agent.

That the said Cooper as such agent kept a bank or pass-book, in which all sums so deposited were entered by this defendant at the time such deposits were made, and that said book was at various times delivered to this defendant, and this defendant thereupon entered upon the other side of the said book each and every item of moneys paid by this defendant on the checks of the said Cooper as such agent, and an itemised account was made out and a balance struck on the said book, and the same was thereupon delived to the said Cooper.

That whenever the said book was balanced, and the account
20 made out as aforesaid, all the checks which had been drawn by the said Cooper, as such agent, on this defendant, on which money had been paid by this defendant as aforesaid, were returned to the said Cooper as vouchers for such payments, and retained by him.

That the said pass-book and account was balanced as aforesaid on the fourteenth day of August, 1880, and the balance in favor of the said Cooper, as such agent, was then found to be the sum of ten thousand eight hundred and fifty-four $\frac{61}{100}$ dollars, which amount and no more was then due from this defendant to said Cooper as such agent.

That thereafter, and on or before the seventh day of October, 1880, the said Cooper, as such agent, deposited with this defendant the sum of thirty-six thousand nine hundred and sixty-seven $\frac{69}{100}$ dollars, and drew checks on this defendant, which, during the said period, were presented to and paid by it, amounting in the aggregate to the sum of thirty-seven thousand $\frac{66}{100}$ dollars; that the said account and pass-book was then balanced as aforesaid on the
21 said seventh day of October, 1880, and the sum of ten thousand eight hundred and twenty-one $\frac{64}{100}$ dollars was found to be due by this defendant to the said Cooper as such agent.

That thereafter and on or before the twentieth day of November, 1880, the said Cooper as such agent, deposited with this defendant sums amounting in all to the sum of eighty-nine thousand three hundred and ninety-eight $\frac{51}{100}$ dollars, and drew checks on this defendant which, during the said period, were presented to and paid by it, amounting in the aggregate to the sum of ninety-five thousand six hundred and fifty-one $\frac{17}{100}$ dollars; that the said account and pass-book was then balanced as aforesaid on the said twentieth day of November, 1880, and the sum of four thousand five hundred and sixty-eight $\frac{68}{100}$ dollars was found to be due by this defendant to the said Cooper as such agent.

That thereafter, and on or before the eighteenth day of
22 January, 1881, the said Cooper, as such agent, deposited with this defendant sums amounting in all to forty-six thousand two hundred and eighty-nine $\frac{5}{100}$ dollars, and drew checks on this

defendant which, during the said period, were presented to and paid by it, amounting in the aggregate to the sum of forty-five thousand two hundred and ninety-one $\frac{3}{100}$ dollars; that the said account and pass-book was then balanced as aforesaid on the said eighteenth day of January, 1881, and the sum of five thousand five hundred and sixty-six $\frac{61}{100}$ dollars was found to be due by this defendant to the said Cooper as such agent.

That thereafter, and on or before the second day of March, 1881, the said Cooper, as such agent, deposited with this defendant sums amounting in all to twenty-one thousand three hundred and sixty-one $\frac{35}{100}$ dollars, and drew checks on this defendant, which, during the said period, were presented to and paid by it, amounting in the aggregate to the sum of twenty-three thousand two hundred and fifty-three $\frac{57}{100}$ dollars; that the said account and pass-book
23 was then balanced, as aforesaid, on the said second day of March, 1881, and the sum of three thousand six hundred and seventy-four $\frac{39}{100}$ dollars was found to be due by this defendant to the said Cooper as such agent.

That since the said second day of March, 1881, and prior to the twenty-second day of March, 1881, the said Cooper, as such agent, has deposited with this defendant sums amounting in all to two thousand three hundred and twenty $\frac{5}{100}$ dollars, and checks drawn by him on this defendant have during the same period been presented to and paid by it, amounting in the aggregate to the sum of five thousand eight hundred and fifty-two $\frac{50}{100}$ dollars, leaving a balance on the said 22nd day of March, 1881, in the hands of this defendant belonging to the said Cooper, as such agent, amounting to the sum of one hundred and forty-one $\frac{91}{100}$ dollars.

That no objection was made by the said plaintiffs or by the
24 said Cooper to the said accounts as so rendered on the seventh day of October, 1880, the twentieth day of November, 1880, or the eighteenth day of January, 1881, or the second day of March, 1881, or to the checks returned therewith as vouchers, as aforesaid, and no error was pointed out therein, and no larger amount was claimed by the plaintiffs or by the said Cooper, to be due to them from this defendant than appears by said bank or pass-book and accounts, until on or about the ninth day of March, 1881.

The defendant admits that on the eighth day of April, 1881, the said Cooper, as such agent as aforesaid, drew and presented to it a check for the sum of nine thousand nine hundred and ninety-six $\frac{38}{100}$ dollars, and demanded payment thereof, and that this defendant refused to and has not paid the same.

It alleges, on information and belief, that on the said eighth day of April, 1881, it was indebted to the said Cooper as such
25 agent, in the aforesaid sum of one hundred and forty-one $\frac{91}{100}$ dollars, and no more; that it has at all times since then been ready and willing to pay the same, but that neither the said plaintiffs nor the said Cooper have ever demanded or required the payment thereof.

And this defendant, further answering the cause of action secondly set out or alleged in the fourth, fifth, and sixth folios of the

said amended complaint, on information and belief, alleges that on or about the twenty-fifth day of August, 1880, the said Cooper, as agent as aforesaid, drew his check upon this defendant in due form, payable to his own order, for the sum of two hundred and eighty $\frac{97}{100}$ dollars; that the said Cooper, as such agent, thereupon endorsed the same, and the same was thereupon presented by his duly constituted substitute and attorney to this defendant for payment, and was duly paid by this defendant to such substitute and attorney in the usual and due course of business, who received the amount
26 thereof, and that the said check was the same check referred to in the second cause of action alleged in the said amended complaint. It denies each and every other allegation contained in the said second cause of action, except that it admits that it has refused and still does refuse to credit the plaintiffs or the said Cooper, as such agent, with the amount of the *amount of the* said check so paid by it as aforesaid.

This defendant, further answering, denies each and every allegation in the said complaint contained not hereinbefore specifically admitted, denied, or averred to.

Wherefore this defendant prays judgment that the said complaint may be dismissed, with costs.

N. B. SANBORN,
Defendant's Attorney,
Office and P. O. Address, 29 *Wall Street, New York City.*

STATE OF NEW YORK,)
City and County of New York,) ss:

David L. Holden, being duly sworn, deposes and says: That
27 he is the cashier of the Leather Manufacturers' National Bank of New York, the above-named defendant; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters that he believes it to be true.

D. L. HOLDEN.

Sworn to before me, this 18th day of June, 1881.
[L. S.] CHARLES F. AUKAMP,
Notary Public, Kings Co. Cert. Filed in N. Y. Co.

28 [Endorsed:] U. S. circuit court, S. D. of New York. Edmund Charles Morgan *et als.* against The Leather Manufacturers' National Bank of New York. Answer. N. B. Sanborn, attorney for defendant, 29 Wall street, New York city. Due service of a copy of the within is hereby admitted. Dated June, 1881. U. S. circuit court. Filed June 18, 1881. Joseph M. Deuel, clerk.

29 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New

York, on Monday, the 12th day of December, in the year of our Lord one thousand eight hundred and eighty-one.

Present: The Honorable Wm. J. Wallace, judge.

EDMOND C. MORGAN *et als.*
vs.
THE LEATHER MANUFACTURERS' NATIONAL BANK.

This case being still on trial, the persons sworn in it are called and severally answer to their names.

The court denies the motion heretofore made herein to direct the jury to find a verdict for the defendant on the second *course* of action, and Mr. Da Costa excepts to the ruling of the court in so doing.

30 Mr. Bowers moves that the court direct the jury to find a verdict for the plaintiffs for the sum of ten thousand seven hundred and forty-one dollars and nine cents.

The court directs the jury to find a verdict for the plaintiffs for the sum of $10,741.09.

The jury say that by direction of the court they find a verdict for the plaintiffs for the sum of ten thousand seven hundred and forty-one dollars and nine cents, and so say they all.

On motion of Mr. Da Costa, ordered that the defendant have a stay of proceedings for thirty days within which to prepare and serve a bill of exceptions herein.

31 [Endorsed:] C. C. of the U. S., S. D. of N. Y. E. C. Morgan *vs.* The Leather Manufacturers' Nat. Bank. Transcript from minutes.

32 Circuit Court of the United States for the Southern District of New York.

EDMOND CHARLES MORGAN, WILLIAM THOMAS BERNERS, and THOMAS PERCY FOX, Plaintiffs,
against
THE LEATHER MANUFACTURERS' NATIONAL BANK, Defendant.

This cause having been tried before the Hon. William J. Wallace and a jury, on the eighth, ninth, and twelfth days of December, eighteen hundred and eighty-one, and the said jury, by direction of the court, having found a verdict for the plaintiffs for the sum of ten thousand seven hundred and forty-one dollars, nine cents; and plaintiffs' costs and disbursements, including interest on said verdict having been taxed by the clerk of this court at the sum of three hundred and two $\frac{71}{100}$ dollars:

33 It is now, on motion of John M. Bowers, counsel for the plaintiffs, adjudged that the above-named plaintiffs, Edmond Charles Morgan, William Thomas Berners, and Thomas Percy Fox, recover of the defendant, The Leather Manufacturers' National Bank, the sum of ten thousand seven hundred and forty-one and 9-100 dollars, principal and interest, together with three hundred and two 71-100 dollars, costs and disbursements, amount-

ing in all to the sum of eleven thousand forty-three and 80-100 dollars, and that said plaintiffs have execution therefor against said defendant.

Judgment signed this 17th day of April, A. D. 1882.

J. M. DEUEL, *Clerk.*

Endorsed: No. 1033. Circuit court of the U. S., south. dist. of N. Y. Edmond Charles Morgan and others *vs.* The Leather Manufacturers' National Bank. Judgment roll. U. S. circuit court. Filed April 17, 1882, 3 p. m. Joseph M. Deuel, clerk.

34 United States Circuit Court for the Southern District of New York.

EDMOND CHARLES MORGAN, WILLIAM THOMAS BERNERS, and THOMAS PERCY FOX

versus

THE LEATHER MANUFACTURERS' NATIONAL BANK OF NEW YORK.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that in the April term, A. D. 1881, came Edmond Charles Morgan, William Thomas Berners, and Thomas Percy Fox, by Platt, Gerard & Bowers, their attorneys, into the circuit court of the United States for the southern district of New York, and impleaded the Leather Manufacturers' National Bank of New York in a certain plea of trespass on the case upon premises, on which the said plaintiffs declared against the said defendant in these words:

35 "Edmond Charles Morgan, William Thomas Berners, and Thomas Percy Fox, who are all aliens, and citizens of the Kingdom of Great Britain, plaintiffs in this suit, by Platt, Gerard & Bowers, their attorneys, complain by this their amended complaint of the Leather Manufacturers' National Bank, which is a corporation duly created by and existing under the laws of the United States of America, and having its place of business at the city of New York, and within the said district, for that whereas plaintiffs were, at all the times hereinafter mentioned, and still are, copartners, carrying on business under the firm name of Ashburner & Co., and had, prior to the eighth day of April, eighteen hundred and eighty-one, opened a bank account with the defendant, which account was kept under the name of 'William B. Cooper, junior, agent for Ashburner & Co.,' and in the usual course of business deposited

36 money with the defendant and drew on the same by checks in the usual form. That after deducting all payments made by the defendant to these plaintiffs or for their use and all the charges which it was entitled to charge against them there remained a balance of the monies of said plaintiffs, in the hands of said defendant, which it had received and held to said plaintiffs' use, on the eighth day of April, eighteen hundred and eighty-one, of nine thousand nine hundred and ninety-six $\frac{85}{100}$ dollars, in which sum the said defendant was, on the day last mentioned, indebted to the plaintiffs.

That on said eighth day of April, eighteen hundred and eighty-one, these plaintiffs duly drew and presented a check for the aforesaid balance to the said defendant, and demanded payment thereof, which the defendant wholly refused. And the said plaintiffs,
37 by their said attorneys, and for a further cause of action, complain of the defendant for that whereas on the twenty-fifth day of August, in the year eighteen hundred and eighty, they were the owners and holders of a certain instrument in writing, commonly called a bank check, for two hundred and eighty 97-100 dollars, drawn and payable to the order of these plaintiffs, which they duly endorsed in writing for deposit to the credit of the account of these plaintiffs with said defendant, whereby notice was given that the same was endorsed for such deposit and for such deposit only, and yet, notwithstanding such endorsement and notice, the defendant obtained possession thereof without plaintiffs' knowledge or consent, and collected and received the amount thereof, and neglected and refused, and still neglects and refuses, to credit the plaintiffs therewith in their said account or pay the same over to them,
38 to their damage in the sum of two hundred and eighty 97-100 dollars. That said defendant, though often requested so to do, has not paid the said balance above mentioned, nor any part thereof, to the plaintiffs, but has hitherto neglected and refused, and still neglects and refuses so to do, to the damage of the plaintiffs in the sum of ten thousand two hundred and seventy-seven 35-100 dollars. Wherefore the plaintiffs bring this suit and demand judgment for the sum of ten thousand two hundred and seventy-seven 35-100 dollars, with interest on said sum from the eighth day of April, eighteen hundred and eighty-one."

To which said amended complaint the said defendant, by N. B. Sanborn, its attorney, pleaded in these words:

"And the said The Leather Manufacturers' National Bank of New York, defendant in this suit, by N. B. Sanborn, its attorney, comes
39 and defends the wrong and injury alleged in the amended complaint herein, and, answering the cause of action alleged in the first three folios of the said amended complaint, says: That it admits that it is a corporation, incorporated and having its place of business as in the said amended complaint alleged, and that prior to the eighth day of April, 1881, William B. Cooper, junior, as agent for the firm of Ashburner & Co., opened a bank account with it under the name of William B. Cooper, Junior, agent for Ashburner & Co.; but this defendant alleges that it has no knowledge or information sufficient to form a belief as to who constituted or constitute the firm of Ashburner & Co., or whether or not the plaintiffs herein constitute such firm, and it therefore leaves the said plaintiffs to make such proof as to the allegations in that behalf in the said amended
40 complaint contained as they may be advised.

"And further answering, and on information and belief, it admits and alleges that prior to the fourteenth day of August, 1880, William B. Cooper, junior, as agent for Ashburner & Co., opened a bank account with this defendant, which account was kept under the

name of William B. Cooper, junior, agent for Ashburner & Co., and that the said Cooper, as such agent, in the usual course of business, deposited money with this defendant, and drew on the same by checks, in the usual form; but it denies that after deducting all payments made by this defendant to the said William B. Cooper, junior, as such agent, or on his order or for his use, and all the charges which this defendant was entitled to charge against the said Cooper as such agent, there remained, on the eighth day of April, 1881, a balance of the moneys of the said plaintiffs, or of the said
41 Cooper, as such agent, in the hands of this defendant, which it had received and held to their or his use, amounting to the sum of nine thousand nine hundred and ninety-six 38-100 dollars, or any sum other or greater than the sum of one hundred and forty-one 91-100 dollars; and it denies that on the said day it was or now is indebted to the said plaintiffs, or to the said Cooper, as such agent, in the sum of nine thousand nine hundred and ninety-six 38-100 dollars, or in any sum other or greater than the said sum of one hundred and forty-one 91-100 dollars.

"And this defendant, further answering, alleges, on information and belief, that prior to and since the fourteenth day of August, 1880, the said William B. Cooper, Junior, as such agent, as aforesaid, kept an account with this defendant and deposited with
42 this defendant from time to time sums of money, and from time to time drew out the money so deposited, by checks in the usual form, signed by him as such agent.

"That the said Cooper, as such agent, kept a bank or pass book, in which all sums so deposited were entered by this defendant at the time such deposits were made, and that said book was at various times delivered to this defendant, and this defendant thereupon entered on the other side of the said book each and every item of moneys paid by this defendant on the checks of the said Cooper, as such agent, and an itemized account was made out and a balance struck on the said book, and the same was thereupon delivered to the said Cooper. That whenever the said book was balanced and the account made out, as aforesaid, all the checks which had been drawn by the said Cooper, as such agent, on this
43 defendant on which money had been paid by this defendant, as aforesaid, were returned to the said Cooper as vouchers for such payments, and retained by him.

"That the said pass-book and account was balanced, as aforesaid, on the fourteenth day of August, 1880, and the balance in favor of the said Cooper, as such agent, was then found to be the sum of ten thousand eight hundred and fifty-four $\frac{6}{100}$ dollars, which amount and no more was then due from this defendant to the said Cooper, as such agent.

"That thereafter, and on or before the seventh day of October, 1880, the said Cooper, as such agent, deposited with this defendant the sum of thirty-six thousand nine hundred and sixty-seven $\frac{6}{100}$ dollars, and drew checks on this defendant, which, during the said period, were presented to and paid by it, amounting in the
44 aggregate to the sum of thirty-seven thousand $\frac{6}{100}$ dollars;

that the said account and pass-book was then balanced, as aforesaid, on the said seventh day of October, 1880, and the sum of ten thousand eight hundred and twenty-one $\frac{64}{100}$ dollars was found to be due by this defendant to the said Cooper, as such agent. That thereafter, and on or before the twentieth day of November, 1880, the said Cooper, as such agent, deposited with this defendant sums amounting in all to the sum of eighty-nine thousand three hundred and ninety-eight $\frac{41}{100}$ dollars, and drew checks on this defendant, which, during the said period, were presented to and paid by it, amounting in the aggregate to the sum of ninety-five thousand six hundred and fifty-one $\frac{53}{100}$ dollars; that the said account and pass-book was then balanced, as aforesaid, on the said twentieth
45 day of November, 1880, and the sum of four thousand five hundred and sixty-eight $\frac{85}{100}$ dollars was found to be due by this defendant to the said Cooper, as such agent.

"That thereafter, and on or before the eighteenth day of January, 1881, the said Cooper, as such agent, deposited with this defendant sums amounting in all to forty-six thousand two hundred and eighty-nine 2-100 dollars, and drew checks on this defendant, which during the said were presented to and paid by it, amounting in the aggregate to the sum of forty-five thousand two hundred and ninety-one 9-100 dollars; that the said account and pass-book was then balanced as aforesaid on the said eighteenth day of January, 1881, and the sum of five thousand five hundred and sixty-six 61-100 dol-
46 lars was found to be due by this defendant to the said Cooper, as such agent.

"That thereafter, and on or before the second day of March, 1881, the said Cooper, as such agent, deposited with this defendant sums amounting in all to twenty-one thousand three hundred and sixty-one 35-100 dollars, and drew checks on this defendant, which during the said period were presented to and paid by it, amounting in the aggregate to the sum of twenty-three thousand two hundred and fifty-three 57-100 dollars; that the said account and pass-book was then balanced as aforesaid on the said second day of March, 1881, and the sum of three thousand six hundred and seventy-four 39-100 dollars was found to be due by this defendant to the said Cooper, as said agent.

"That since the said second day of March, 1881, and prior to the twenty-second day of March, 1881, the said Cooper, as
47 such agent, has deposited with this defendant sums amounting in all to two thousand three hundred and twenty 2-100 dollars, and checks drawn by him on this defendant have during the same period been presented to and paid by it, amounting in the aggregate to the sum of five thousand eight hundred and fifty-two 50-100 dollars, leaving a balance on the said twenty-second day of March, 1881, in the hands of this defendant belonging to the said Cooper, as such agent, amounting to the sum of one hundred and forty-one 91-100 dollars.

"That no objection was made by the said plaintiffs or by the said Cooper to the said accounts, as so rendered on the seventh day of October, 1880, the twentieth day of November, 1880, or the eigh-

name of William B. Cooper, junior, agent for Ashburner & Co., and that the said Cooper, as such agent, in the usual course of business, deposited money with this defendant, and drew on the same by checks, in the usual form; but it denies that after deducting all payments made by this defendant to the said William B. Cooper, junior, as such agent, or on his order or for his use, and all the charges which this defendant was entitled to charge against the said Cooper as such agent, there remained, on the eighth day of April, 1881, a balance of the moneys of the said plaintiffs, or of the said
41 Cooper, as such agent, in the hands of this defendant, which it had received and held to their or his use, amounting to the sum of nine thousand nine hundred and ninety-six 38-100 dollars, or any sum other or greater than the sum of one hundred and forty-one 91-100 dollars; and it denies that on the said day it was or now is indebted to the said plaintiffs, or to the said Cooper, as such agent, in the sum of nine thousand nine hundred and ninety-six 38-100 dollars, or in any sum other or greater than the said sum of one hundred and forty-one 91-100 dollars.

"And this defendant, further answering, alleges, on information and belief, that prior to and since the fourteenth day of August, 1880, the said William B. Cooper, Junior, as such agent, as aforesaid, kept an account with this defendant and deposited with
42 this defendant from time to time sums of money, and from time to time drew out the money so deposited, by checks in the usual form, signed by him as such agent.

"That the said Cooper, as such agent, kept a bank or pass book, in which all sums so deposited were entered by this defendant at the time such deposits were made, and that said book was at various times delivered to this defendant, and this defendant thereupon entered on the other side of the said book each and every item of moneys paid by this defendant on the checks of the said Cooper, as such agent, and an itemized account was made out and a balance struck on the said book, and the same was thereupon delivered to the said Cooper. That whenever the said book was balanced and the account made out, as aforesaid, all the checks which had been drawn by the said Cooper, as such agent, on this
43 defendant on which money had been paid by this defendant, as aforesaid, were returned to the said Cooper as vouchers for such payments, and retained by him.

"That the said pass-book and account was balanced, as aforesaid, on the fourteenth day of August, 1880, and the balance in favor of the said Cooper, as such agent, was then found to be the sum of ten thousand eight hundred and fifty-four $\frac{63}{100}$ dollars, which amount and no more was then due from this defendant to the said Cooper, as such agent.

"That thereafter, and on or before the seventh day of October, 1880, the said Cooper, as such agent, deposited with this defendant the sum of thirty-six thousand nine hundred and sixty-seven $\frac{62}{100}$ dollars, and drew checks on this defendant, which, during the said
44 period, were presented to and paid by it, amounting in the aggregate to the sum of thirty-seven thousand $\frac{66}{100}$ dollars;

that the said account and pass-book was then balanced, as aforesaid, on the said seventh day of October, 1880, and the sum of ten thousand eight hundred and twenty-one $\frac{64}{100}$ dollars was found to be due by this defendant to the said Cooper, as such agent. That thereafter, and on or before the twentieth day of November, 1880, the said Cooper, as such agent, deposited with this defendant sums amounting in all to the sum of eighty-nine thousand three hundred and ninety-eight $\frac{51}{100}$ dollars, and drew checks on this defendant, which, during the said period, were presented to and paid by it, amounting in the aggregate to the sum of ninety-five thousand six hundred and fifty-one $\frac{55}{100}$ dollars; that the said account and pass-book was then balanced, as aforesaid, on the said twentieth
45 day of November, 1880, and the sum of four thousand five hundred and sixty-eight $\frac{68}{100}$ dollars was found to be due by this defendant to the said Cooper, as such agent.

"That thereafter, and on or before the eighteenth day of January, 1881, the said Cooper, as such agent, deposited with this defendant sums amounting in all to forty-six thousand two hundred and eighty-nine 2-100 dollars, and drew checks on this defendant, which during the said were presented to and paid by it, amounting in the aggregate to the sum of forty-five thousand two hundred and ninety-one 9-100 dollars; that the said account and pass-book was then balanced as aforesaid on the said eighteenth day of January, 1881, and the
sum of five thousand five hundred and sixty-six 61-100 dol-
46 lars was found to be due by this defendant to the said Cooper, as such agent.

"That thereafter, and on or before the second day of March, 1881, the said Cooper, as such agent, deposited with this defendant sums amounting in all to twenty-one thousand three hundred and sixty-one 35-100 dollars, and drew checks on this defendant, which during the said period were presented to and paid by it, amounting in the aggregate to the sum of twenty-three thousand two hundred and fifty-three 57-100 dollars; that the said account and pass-book was then balanced as aforesaid on the said second day of March, 1881, and the sum of three thousand six hundred and seventy-four 39-100 dollars was found to be due by this defendant to the said Cooper, as said agent.

"That since the said second day of March, 1881, and prior to
the twenty-second day of March, 1881, the said Cooper, as
47 such agent, has deposited with this defendant sums amounting in all to two thousand three hundred and twenty 2-100 dollars, and checks drawn by him on this defendant have during the same period been presented to and paid by it, amounting in the aggregate to the sum of five thousand eight hundred and fifty-two 50-100 dollars, leaving a balance on the said twenty-second day of March, 1881, in the hands of this defendant belonging to the said Cooper, as such agent, amounting to the sum of one hundred and forty-one 91-100 dollars.

"That no objection was made by the said plaintiffs or by the said Cooper to the said accounts, as so rendered on the seventh day of October, 1880, the twentieth day of November, 1880, or the eigh-

teenth day of January, 1881, or to the checks returned therewith as vouchers as aforesaid,
48 and no error was pointed out therein, and no larger amount was claimed by the plaintiffs or by the said Cooper to be due to them from this defendant than appears by said bank or pass-book and accounts until on or about the ninth day of March, 1881.

"This defendant admits that on the eighth day of April, 1881, the said Cooper, as such agent as aforesaid, drew and presented to it a check for the sum of nine thousand nine hundred and ninety-six 38-100 dollars, and demanded payment thereof, and that this defendant refused to, and has not, paid the same.

"It alleges, on information and belief, that on the said eighth day of April, 1881, it was indebted to the said Cooper, as such agent, in the aforesaid sum of one hundred and forty-one 91-100, and no more; that it has at all times since then been ready
49 and willing to pay the same, but that neither the said plaintiffs nor the said Cooper have ever demanded or required the payment thereof.

"And this defendant, further answering the cause of action secondly set out or alleged in the fourth, fifth, and sixth folios of the said amended complaint, on information and belief, alleges that on or about the twenty-fifth day of August, 1880, the said Cooper, as agent as aforesaid, drew his check upon this defendant in due form, payable to his own order, for the sum of two hundred and eighty $\frac{91}{100}$ dollars.

"That the said Cooper, as such agent, thereupon endorsed the same, and the same was thereupon presented by his duly constituted substitute and attorney to this defendant for payment, and was duly paid by this defendant to such substitute and attorney in the usual and due course of business, who received the amount
50 thereof, and that the said check was the same check referred to in the second cause of action alleged in the said amended complaint.

"It denies each and every other allegation contained in the said second cause of action, except that it admits that it has refused, and still does refuse, to credit the plaintiffs or the said Cooper, as such agent, with the amount of the said check so paid by it, as aforesaid.

"This defendant, further answering, denies each and every allegation in the said complaint contained not hereinbefore specifically admitted, denied, or averred to.

"Wherefore this defendant prays judgment that the said complaint may be dismissed, with costs."

And thereupon issue was joined between the said plaintiffs
51 and the said defendant.

And afterwards, to wit, on the eighth day of December, 1881, at the October term, A. D. 1881, of said circuit court, held at the Post Office buildings in the city of New York, before the Honorable William I. Wallace, one of the judges appointed to hold the said circuit court according to the form of the statute in such case

made and provided, the aforesaid issues so joined between the said parties as aforesaid came on to be tried by a jury for that purpose duly empanelled.

At which day came then as well the said plaintiffs as the said defendant, by their respective attorneys aforesaid, and the jurors of the jury aforesaid empanelled to try the same being called, also came, and were then and there in due manner chosen and sworn to try the said issues.

52 And upon the trial of the said issues (the amount claimed in the complaint having first by order of the court, made without objection, been increased to $10,327.35), the counsel for the said plaintiffs, to maintain and prove the said issue on their part, as to the first cause of action, read the deposition of C. Clifford Berlin, taken at Wilmington, Delaware, in June, 1881, *de bene esse*, who testified that he was then twenty years of age; that from January 1, 1878, to the early part of March, 1881, he had been in the employ of W. B. Cooper, Jr., agent in New York for Ashburner & Co., of Calcutta (the plaintiffs), as confidential clerk, having entire management of the office, keeping all the books (including the check-book), having charge of the bank account kept by the defendant, by and in the name of "W. B. Cooper, Jr., agent for Ash-

53 burner & Co.," from the time such account was opened by Mr. Cooper, filling up the body of all checks drawn on such account, but not signing them; entering all such checks in the stub of his employers' check-book, such entries being made to correspond with the checks, and containing the date, the name of the payee, the amount and the purpose for which the check was drawn, and balancing such check-book with the deposit-book and vouchers whenever the account was balanced and returned by the defendant, accompanied by the checks drawn by Mr. Cooper as vouchers, Mr. Cooper taking no part in such examination, except to look over the vouchers to see if the endorsements were correct; that between the eleventh day of September, 1880, and the thirteenth day of February, 1881, he filled up, in pursuance of instructions from

54 Mr. Cooper, or in the regular course of business, among many others, the following checks on the defendant, and after they had been duly signed by Mr. Cooper and returned to him, altered the same by erasure and rewriting part of the body in and before they left Mr. Cooper's office, and on presenting them as so altered to the defendant he received from it the full raised amount; that out of the amounts so received by him he paid to Mr. Cooper, or to his use, the several amounts for which the checks were originally drawn, and appropriated the excess so received by him to his own use for the payment of his gambling debts; that the numbers of said checks so altered, their dates, and the character of the alterations were as follows, viz:

55

No. of check.	Date of check.	Character of alteration.
8356	Sept. 11, 1880	Check to cash or bearer, raised from $90 to $500.
8377	Sept. 28, 1880	Check to cash or bearer, raised from $10 to $400.
8424	Oct. 30, 1880	Check to cash or bearer, raised from $105 to $405.
8431	Nov'r 3, 1880	Check to cash or bearer, raised from $17.25 to $600.25.
8468	Nov. 26, 1880	Check to cash or bearer, raised from $10 to $1,000.
8480	Dec. 10, 1880	Check to order of Marston & Son, raised from $7.75 to $700.25, and words "or bearer" written in after payee's name.
8492	Dec. 18, 1880	Check to order of C. H. Clayton, raised from $15 to $1,500, and words "or bearer" written in after payee's name.
8498	Dec. 24, 1880	Check to cash or bearer, raised from $80 to $600.
8501	Dec. 28, 1880	Check to order of W. S. Daland, raised from $24.08 to $1,000, and words "or bearer" written in after payee's name.
8504	Dec. 31, 1880	Check to cash or bearer, raised from $80 to $400.

56

8508	Jan'y 5, 1881	Check to cash or bearer, raised from $10 to $2,000.
8518	Jan'y 14, 1881	Check to order of Charles G. Hanks, raised from $33.60 to $1,100, and words "or bearer (duty)" written in after payee's name.
8550	Jan'y 13, 1881	Check to order of W. S. Daland, raised from $17.72 to $100.72, and words "or C. Clifford Berlin," written in after payee's name.

The details as to each check were given at length by the witness, by reference to the stub of the check-book, and by reference to the last two checks, which were produced at the taking of such examination.

The witness further testifies that the entries made by him in the stub of the check-book were always the correct ones, for which the checks had been originally drawn before being altered, but
57 that, to hide the matter, he forced the footings of the stubs of the check-book by making false additions, equal to the increase of the checks as altered, each of which alterations, in addition, he point[ed] out on the stubs of the check-book.

The witness further testified that his said employer's pass-book was balanced by the defendant on October seventh, 1880, and there appeared charged therein, and among the vouchers returned therewith by it were the aforesaid checks, Nos. 8356 and 8377, as altered by him, at which altered amounts they were charged against the plaintiffs, both of which he destroyed, and showed only the rest of the vouchers to Mr. Cooper; that said pass-book was again balanced by the defendant on November 20th, 1880, and that there appeared charged therein and among the vouchers returned therewith by it were the aforesaid checks, Nos. 8424 and 8431, so altered by him, both of which he destroyed, and does not remember whether
58 he showed the rest of the vouchers to Mr. Cooper or not; that said pass-book was again balanced by the defendant on January 18, 1881, and that there appeared charged therein and among

the vouchers returned therewith by it were the aforesaid checks, Nos. 8468, 8480, 8492, 8498, 8501, 8504, and 8508, as altered by him, all of which he destroyed.

That as to check No. 8501, he altered the stub by inserting the name Julius Brandies, and erasing the name W. S. Daland, because he had no bill from Brandies that month, and he expected Daland would be in any day with a bill, and it would look funny to have two checks for the same amount to his order.

That Mr. Cooper knew, on the day or within a few days after each of said balancings, that his pass-book had been balanced and the vouchers returned.

59 The counsel for the said plaintiffs then read in evidence the aforesaid checks, Nos. 8518 and 8550, which are as follows, viz:

The erasures were in the check No. 8518 as follows: After the word "Hanks" a line was erased and words "or bearer (duty)" written over erasure. The words and figures "thirty-three 60-100," and part of the line drawn thereafter were erased, and words "eleven hundred" written over erasure. The figures "33 $\frac{60}{100}$" in the corner of the check were erased, and figures "1,100" made over erasure, and the date "14th" erased, and "27th" made over erasure.

In the check No. 8550, the alterations were as follows: The line was erased after the word "Daland," and the words or "C. Clifford Berlin" written over erasure; the words and figure, "seventeen & 72-100" were erased, and the words "one hundred" written
60 over erasure; and in the corner, the figures "17" were erased, and the figures "100" written over erasure.

No. 8518. NEW YORK, *January 27th*, 1881.

Leather Manufacturers' National Bank, pay to the order of Charles G. Hanks, or bearer, (duty,) eleven hundred dollars.

$1,100. W. B. COOPER, JR.,
Agent for Ashburner & Co.

[On the side:] Wm. B. Cooper, Jun'r, agent.

Endorsed: C. Clifford Berlin. Deposited by Union Trust Co. in Nat'l Bank of Commerce.

No. 8550. NEW YORK, *February 14th*, 1881.

Leather Manufacturers' National Bank, pay to the order of Wm. S. Daland, or C. Clifford Berlin, one hundred 72-100 dollars.

$100.72. W. B. COOPER, JR.,
Agent for Ashburner & Co.

[On the side:] Wm. B. Cooper, Jun'r, agent.

The counsel for the said defendant, to maintain and prove the said issue on its part, then read in evidence the cross-examination of the said witness, C. Clifford Berlin, who, on such cross-examination, testified that it was not a common thing for Mr. Cooper's checks to be paid over the counter. That Mr. Cooper employed two clerks, of whom he was one.

That he kept his cash-book incorrectly to make it agree with his
61 forgeries. Mr. Cooper was in the habit of examining his check-book from time to time; that for a time he, Berlin, was in the habit of making deposits in the bank and presenting for payment such checks as were drawn for that purpose, but he was not in the habit of so doing for the last eight or ten months; that he was well known to the teller of the defendant bank, and known by them as being the representative of Mr. Cooper; that whenever a deposit was made to the credit of his employers' account the pass-book was presented to the defendant's receiving teller, who thereupon entered on the debit side the amount of such deposit, with the date and his initials, and that for the balancing of such pass-book the same was delivered to the book-keeper of the defendant, by whom all checks so drawn by Mr. Cooper and paid by the defendant were separately entered
62 on the credit side of said pass-book, the balance struck, and the pass-book returned with the vouchers, which consisted of all Mr. Cooper's checks paid by the defendant; that on each balancing of the pass-book, to wit, on October 7, 1880, November 20, 1880, and January 18, 1881, all the checks entered on the credit side of the pass-book at each balancing were returned, and the number of such vouchers stated across the face of said pass-book; that on the credit side of the pass-book in the balancing of October 7, 1880, there appeared the two items of $500 and $400 (being the aforesaid checks, Nos. 8356 and 8377), and that Mr. Cooper's check-book did not show that any checks for either of such amounts had been drawn between such balancing and the preceding one, or that at the time of such preceding balancing any check for either of such amounts was then outstanding and unpaid; that on the credit
63 side of the pass-book, on the balancing of November 20, 1880, there appeared the two items of $405 and $600.25 (being for the aforesaid checks, Nos. 8424 and 8431), and that Mr. Cooper's check-book did not show that any check for either of such amounts had been drawn between such balancing and the preceding one, or that at the time of such preceding balancing any check for either of such amounts was then outstanding and unpaid; that on the credit side of the pass-book, in the balancing of January 18, 1881, there appeared the seven items of $1,000, $700.75, $1,500, $600, $1,000, $400, $2,000 (being for the aforesaid checks, Nos. 8468, 8480, 8492, 8498, 8501, 8504, 8508), and that Mr. Cooper's check-book did not show that any checks for any of such amounts (except an ad-
64 ditional check for $600, which also appeared on such credit side) had been drawn between such balancing and the preceding one, or that at the time of such preceding balancing any check for either of such amounts was then outstanding or unpaid; that he made all the erasures and alterations in the various checks, in the plaintiffs' office, with great care, and that such erasures and alterations could not be detected without a very careful scrutiny or a very close and careful examination.

65 The counsel for the defendant then read in evidence the following pages of the pass-book, which was endorsed Leather Manufacturers' National Bank with Wm. B. Cooper, Jr., agent for Ashburner & Co., and headed as follows:

66 *Leather Manufacturers' National Bank in acc't with Wm B. Cooper, Jr., Agent Ashburner & Co.*

DR. CR.

1880.

Aug.	14.	Balance	10,854 61		3 62		567 72		25	
	23.	S.	3,309 34		440 36		100		500	
	25.	S.	1,876 49		37 50		35		22	12
	30.	S.	1,349 37		41 65		135 86		19	63
Sept.	1.	C.	2,149 21		17 75		22 12		100	00
	11.	C.	3,786 92		35		50		32	60
	14.	C.	9,047 14		5 50		45		150	
	16.	C.	2,925 54		5 59		31 40		23	33
	18.	C.	1,945 64		50		100		15	
	21.	C.	1,483 91		8 70		14 79		50	
	24.	C.	1,181 65		8 51		6 71		2,000	
	28.	C.	970 59		25		21 70		135	
	30.	C.	4,662 84		280 97		223 20		31	40
Oct.	2.	C.	1,264 29		9,625		17 19		5,126	25
Oct.	6.	C.	775 56		145 62		90		29	90
					9,679 69		25		56	40
					802 50		400		91	30
					50		68 67		348	
					31 72		19 50		21	24
					3,500		106 50		25	
					5 25		80			
					Balance				10,821	64
			47,584 10						47,584	10

62 vouchers returned.

67

1880.

Oct.	7.	Balance	10,821 64		45		25 90		1,547	03
	8.	C.	1,481 73		62 50		8 89		20	
	9.	C.	610 33		27		1,134		210	
	11.	C.	6,707 02		21 37		21 25		26	
	13.	C.	1,784 99		9,679 89		16 45		14,533	81
	15.	C.	1,188 86		454 59		9,682		8	
	19.	C.	1,123 27		17		22		25	
	20.	C.	4,517 68		16 36		25		14,529	50
	23.	C.	7,602 29		76 27		36 12		596	20
	26.	S.	16,441 88		846 70		33 50		22	14
	27.	C.	2,570 13		100		123 04		10	63
	28.	C.	2,641 96		10		50		405	00
	30.	C.	23,813 00		52		29 75		17	50
Nov.	1.	C.	3,132 86		25		73 30		40	97
	3.	C.	2,083 08		14,539		9 13		41	83
	4.	C.	1,969 67		25		865 88		20	61
	8.	C.	735 84		588 88		25		50	
	10.	C.	2,754 20		33 57		15		2,500	
	13.	C.	1,443 82		600 25		738 60		70	76
	17.	S.	2,936 52		8		12		164	92
	18.	C.	1,883 55		51 75		129 83		20	
	19.	S.	1,976 13		110		135		4,827	50
					40 13		50			
					47 02		7 75			
					109 84		72 15			
					262 31		11 50			
					14,524 50		63 10			
					25					
					14 30					
					135					
					Balance				4,568	68
			100,220 45						100,220	45

79 vouchers returned.

68

1880.										
Nov.	20.	Balance	4,568 68		80			20 05		71 31
	23.	C.	2,904 43		50			100		45
	24.	C.	477 21		8 60			600		2,000
	27.	S	1,572 59		123			12		4,822 50
Dec.	3.	S.	5,915 63		28			4,816 99		350
	6.	C.	412 68		15			75		85
	9.	C.	4,518 94		1,000			7 70		10 14
	10.	C.	971 46		143 20			80		37 40
	13.	C.	3,672 49		90			1,500		50
	14	C.	864 43		4,820			12 80		66 65
	18.	C.	3,220 15		734 44			75		29 75
	21.	C.	988 54		50			4,546 01		536 25
	22.	C.	338 64		54 25			600		2,777 90
	24.	C.	578 14		4,812 50			10 05		100
	28.	C.	1,780 70		100			100		10 68
	29.	C.	1,249 06		7 92			1,000		15
	31.	C.	541 06		80			19 10		41 69
1881.										
Jan.	3.	C.	4,047 16		52 96			400		110 86
	4.	C.	4,434 28		100			138 95		48 11
	5.	C.	341 24		63			7 75		
	7.	C.	1,489 34		700 75			100		
	12.	C	699 92		48 76			1,737 89		
	13.	S.	3,564 91		100					
	17.	S.	648 55		4,817 50					
	18.	S	1,057 47		43 68					
					Balance					5,566 61
			50,857 70							50,857 70

66 vouchers ret'd.

69 The counsel for the plaintiffs then read in evidence the redirect examination of the said witness Berlin, who, on such redirect examination, testified that he did not think that he had made the alterations in checks Nos. 8518 and 8550 with any less care than the alterations in the other checks, and that he did not consider that the alterations in checks Nos. 8518 and 8550 could only be discovered on a clear and minute inspection.

The counsel for the plaintiffs, further to maintain the issues on their part as to the first cause of action, called William B. Cooper, Jr., who, being sworn, testified that the plaintiffs composed the firm of Ashburner & Company, of Calcutta, and that he was their general agent in the United States; that in 1877 or 1878 he opened an account with the defendant in the name of "W. B. Cooper, Jr., agent for Ashburner & Co.;" that he had known Berlin since he
70 was twelve years old, and knew his family, and that he had every confidence in him; that his account with the defendant's bank was balanced from time to time, which was done by the bank writing up the pass-book and returning the checks that had been paid by it; that when the pass-book was so returned it went to the clerk, Berlin, who then balanced the check-book, that being one of the duties imposed upon him; that the witness took no part in such balancing, but Berlin generally showed him the vouchers that were returned, because he used to like to look at them, but he never gave Berlin any particular instructions so to do.

That he was in the habit of looking over his check-book and kept

track of the balance, which, during the months of August, September, November, and December, 1880, and January, 1881, he understood to be about $10,000, and that when he asked Berlin as
71 to the balance his answer agreed with about what he supposed was in the bank; that he sometimes added up the footings of the check-book, and once discovered during the period of these forgeries an error in the footing, and spoke to Berlin about it, who replied that it was very seldom he was caught in a mistake, and that he, the said Cooper, believed him. That his general course of business as to his signing checks drawn upon the defendant was this: He, the witness, was always aware of how much money he owed different parties, and he authorized Berlin to fill in the checks to pay the various bills owed when they were presented to him for his signature.

That it was the custom of the office for Berlin to present to him weekly checks for cash for office use, viz., for salaries and petty expenses.

That course was pursued with reference to each of the
72 checks in this case that were drawn to the order of cash or bearer, except occasionally Berlin would state that a little more was needed as some expenses had come in not estimated, which would lead to his signing other checks to order of cash.

When the stub states that the money was for W. B. Cooper, Jr., it means that witness was to take so much out of the check for his personal expenses. When he wanted money for his personal expenses he always so instructed Berlin. Berlin each week told him what he wanted for office expenses, and he told Berlin what he wanted for himself, and the sum total made the amount of the check; that he recollects about check 8480, which appears by the stub to have been drawn to order of Marston & Son for $7.75. That was drawn to pay a coal bill; that he recollects about check 8492, which appears by the stub to have been drawn to order of C. H. Clayton for $15.00. Berlin handed him this for signature;
73 he said: "How do you come to owe Clayton $15?" Berlin said: "We did not pay last month's bill." (We bought a peculiar kind of writing paper from him), and witness signed the check for $15; that he recollects about check 8501, which appears by the stub to have been drawn to the order of W. S. Daland for $24.08; Berlin presented the check to him for signature; Daland sold jute to witness. At that particular time witness owed him a small amount of money, and remembers distinctly signing the check for that amount to his order; that he remembers check 8518 drawn to the order of Charles G. Hanks for $33.60; he distinctly remembers signing it; Hanks was his custom-house broker; that he recollects signing the check 8550 for $17.72 to order of W. S. Daland. He was a jute broker, with whom witness had dealings.

All these 13 forged or altered checks were to his recollec-
74 tion signed at the amounts stated in the stubs of the check-book, the payees' names being as stated in each stub. Such stubs are as follows:

1. 8356.
September 11.
Petty cash 65
W. B. Cooper, Jr. 25
90

2. 8377.
September 28.
Cash 10

3. 8424.
October 30th.
W. B. Cooper, Jr. 50
Cash 55
105

4. 8431.
November 3rd.
Cable account paid bearer 17 25

5. 8468.
November 26th.
Cash 10

75 6. 8480.
December 10th, 1880.
Expense account paid Marston & Son 7 75

7. 8492.
December 18th.
Stationery account paid C. H. Clayton & Co. 15 00

8. 8498.
December 24th.
Cash 30
W. B. C. 50
80

9. 8501.
December 28th.
Brokerage account paid Julius Brandies 24 08

10. 8504.
December 31st.
W. B. Cooper, Jr. 50
Petty cash 30
80

76 11. 8508.
January 5th.
Cash 10

12. 8518.
January 14th.
Chas. G. Hanks 33 60

13. 8550.
February 13, 1881.
Brokerage account paid W. S. Daland 17 72

None of them were signed by him for the amounts it now appears the bank charged against his account. It was always imperative that after the payee's name on every check a line should be drawn. That he has filled in such lines when the line drawn appeared to be rather faint. After both the words and the figures expressing the amount a double cross and line were also drawn,
77 thus ⨯———. Berlin at times drew money from the bank on checks drawn to bearer, but never large amounts. The rule was not to send him at all. That he discovered the alterations in his checks about the first or second of March, 1881; that Berlin, his clerk, stayed away from the office for a day, and that the witness on such day compared his pass-book with the stubs of his check-book, and discovered that a certain number of checks appearing on such stubs were not charged against him in his pass-book, and did not appear to have been returned by the bank; while others, which appeared by his pass-book to have been charged against and returned to him, did not by the stub of the check-book appear to have ever been drawn; that thereupon he sent his bank-book to the bank to be balanced, and it was balanced on March 2, 1881, and among the vouchers then returned were the aforesaid checks, Nos. 8518
78 and 8550, which had been altered from their original amounts; that this was the first knowledge he had of the forgeries; that he then notified the bank that his clerk had absconded, and that alterations had taken place, and requested them not to pay any more of his checks the bodies of which were filled up in the handwriting of his clerk, Berlin; that thereafter he made a claim on the bank, accompanied by a detailed statement, offering at the same time to return to the bank the aforesaid checks, Nos. 8518 and 8550.

The counsel for the said defendant, to maintain and prove the said issue on its part as to the first cause of action, cross-examined the said William B. Cooper, Jr., and on such cross examination he testified that as soon as he discovered the alterations of his
79 checks he notified the bank not to pay any more checks the bodies of which were filled up in the handwriting of his clerk, Berlin, and that he did so for the protection both of himself and of the bank; that after such direction the bank did not pay any of his checks the bodies of which were filled up in the handwriting of Berlin; that if on any day after the seventh day of October, 1880, he had made an examination to verify the correctness of the balancing of his pass-book made on such day, similar to the one he made on or about the 1st or 2nd day of March, 1881, he would have discovered the two altered checks that were returned among his vouchers on such balancing of October seventh, 1880, to wit, checks

Nos. 8356 and 8377; that if on any day after the twentieth day of November, 1880, he had made a similar examination to verify the correctness of the balancing of his pass-book made on such day, he would have easily discovered the two altered checks that
80 were returned among his vouchers on such balancing of November, 20, 1880, to wit, checks Nos. 8424 and 8431; that if on any day after the eighteenth day of January, 1881, he had made a similar examination to verify the correctness of the balancing of his pass-book made on such day, he would have easily discovered the seven altered checks that were returned among his vouchers on such balancing of January 18, 1881, to wit, checks Nos. 8468, 8480, 8492, 8498, 8501, 8504, and 8508; that he had been a dealer with the defendant bank for upwards of eighteen years, and that he knew that it was its custom, as well as the custom of all banks, to balance at intervals the pass-books of its depositors and to return the same when balanced, accompanied by the checks drawn by the depositor and charged to the account, as the vouchers of the bank for such payments; that he never compared his pass-book, when balanced and re-
81 turned to him with his vouchers, with the stubs of his check-book, but that he devolved the duty of so doing on his clerk, Berlin; that for the last five or ten years past he knew of various means adopted by bankers and merchants to prevent the raisings or alterations of their checks, but that he had not employed or used any of such methods; that he had not surrendered, or offered to surrender, to the defendant any of the alleged raised or altered checks, save the aforesaid checks Nos. 8518 and 8550, because they had been destroyed by his clerk, Berlin.

The counsel for the said plaintiffs, to maintain and prove the issue as to the second cause of action, then read in evidence the following check:

82 No. 8343. NEW YORK, *August* 25, 1880.

Leather Manufacturers' National Bank pay to the order of W. B. Cooper, Jr., agent, two hundred and eighty & $\frac{97}{100}$ dollars.

$280.97. W. B. COOPER, JR.,
Agent for Ashburner & Co.

[On the side:] Wm. B. Cooper, Jun'r, agent.

[Across the face:] Gold.

The following is a *fac-simile* of the endorsement on such check, the words "W. B. Cooper, Jr., agent," being in writing, and the remaining portion stamped in print:

For deposit in Leather Man'f's' Nat. Bank to the credit of W. B. Cooper, Jr., agent, ag't for Ashburner & Co.

And then gave evidence that, being so endorsed as aforesaid, it was delivered, with a number of other checks, to Berlin, for the purpose of depositing the same to the credit of the plaintiffs with
83 the defendant. The total amount of the checks so delivered to Berlin for deposit was, as entered in the stub of the check-

book, $3,590.31. The deposit credited by the bank was only $3,309.34. The difference is exactly this check, $280.97.

The counsel for the defendant then and there admitted that the said check was presented for payment to the defendant by Berlin, Mr. Cooper's clerk, and, on such presentation made at the counter of the defendant's bank, was paid to Berlin, and that no credit for the same was ever given the plaintiffs on their account; and the witness then testified that the plaintiffs did not receive the benefit of such payment, and that he never received the money in any way, shape, or manner. The counsel for the plaintiff on their part admitted the genuineness in every respect of such check and endorsement.

And thereupon the counsel for the plaintiffs then rested their cause.

84 And the counsel for the said defendant, to maintain and prove the issue on its part, then called Edward D. Butler, who, being sworn, testified that he was the paying teller of the defendant's bank; that he had occupied such position since 1866, with the exception of an interval from January, 1871, to June, 1872; that the check No. 8343, for $280 $\frac{97}{100}$, was not paid by him, as at that time he was absent on his vacation, but was paid by a teller temporarily filling his place; that he knew Berlin, and knew him to be the clerk of William B. Cooper, Jr., agent for Ashburner & Company; that such clerk was in the habit of coming to the bank with Mr. Cooper's checks, both for drawing and depositing the same, and that there was nothing unusual in his presenting for payment such checks payable to bearer; that on the presentation of each of Mr. Cooper's checks he examined them, as he did all others, carefully as to the signature, the amounts, dates,

85 and the endorsements, and also to see whether on their face anything appeared indicating erasure or alteration; and that if he had discovered any alterations or erasures he would not have paid the checks; that he never at any time observed anything on any of Mr. Cooper's checks presented to him at the bank by Mr. Berlin for payment to excite or arouse his suspicion of any erasure or alteration having taken place; that check No. 8518 was presented by Mr. Berlin to him at the defendant's bank and by him paid; that check No. 8550 was not so presented, but was deposited in another bank by Berlin to his credit, and came through the clearing-house; that when check No. 8518 was presented to him for payment at the bank by Berlin it was not in the condition in which it now appeared to be, the difference being that the alteration was now apparent, but was not at the time of its presentation to him for pay-

86 ment; that a check immediately after it has been altered does not so readily or clearly present the appearance of an altered check as it does some time afterwards, and after it has been handled by numerous persons, as in the instance of check No. 8518.

And the counsel for the said defendant, further to maintain and prove the said issue on its part, called David L. Holden, who, being sworn, testified that he was and since 1872 had been the cashier of the defendant; that if Mr. Cooper, on or about the seventh

day of October, 1880, had informed the defendant that two of the vouchers returned by it and charged in Mr. Cooper's account in the balancing of his pass-book of October 7, 1880, had been raised or altered, the defendant would have given direction to its tellers not to pay any more checks of Mr. Cooper the bodies of which here in the handwriting of Berlin, and would have taken measures
87 to arrest the criminal, as well as to recover the amount paid out by them on such raised checks; that if Mr. Cooper, on or about the twentieth day of November, 1880, had informed the defendant that two of the vouchers returned by it and charged in Mr. Cooper's account in the balancing of his pass-book of November 20th, 1880, had been raised or altered, the defendant would have given direction to its tellers not to pay any more checks of Mr. Cooper the bodies of which were in the handwriting of Berlin, and would have taken measures to arrest the criminal, as well as to recover the amount paid out by them on such raised checks; that if Mr. Cooper, on or about the eighteenth day of January, 1881, had informed the defendant that seven of the vouchers returned by it and charged in Mr. Cooper's account in the balancing of his pass-book of January 18th, 1881, had been raised or altered, the defend-
88 ant would have given direction to its tellers not to pay any more checks of Mr. Cooper the bodies of which were in the handwriting of Berlin, and would have taken measures to arrest the criminal, as well as to recover the amount paid out by the bank on such raised or altered checks.

The counsel for the defendant here rested its case.

The counsel for the defendant then requested his honor, the said judge, to direct the jury to find a verdict in favor of the defendant on the second cause of action in the amended complaint set forth, on the ground that, as there is no dispute as to the genuineness of the check or of its endorsement, the defendant was authorized to pay the said check to Mr. Berlin or any person who might present the same for payment, as the endorsement amounted only to an endorsement in blank.

His honor, the said judge, however, declined so to direct
89 the jury, and, on the contrary thereof, instructed them that on the second cause of action the plaintiffs were entitled to recover a verdict; to which refusal to direct the jury, as requested by the defendant's counsel, and to the instruction to the jury as made, the counsel for the defendant then and there separately and duly excepted.

The counsel for the defendant then requested his honor, the said judge, to direct the jury to render a verdict in favor of the defendant on the first cause of action as to the moneys paid by the defendant on the alleged raised or altered checks which were not tendered to the defendant by Mr. Cooper for surrender before suit brought. His honor, the said judge, however, refused to give the prayed-for direction to the jury, to which refusal the counsel *by* the defendant then and there duly excepted.

90 The counsel for the defendant then requested his honor, the said judge, to direct the jury to render a verdict in favor

of the defendant on the first cause of action (except as to the admitted balance of $141.91), on the ground that, as it appeared by Mr. Cooper's testimony, that he did not personally verify the accounts between himself and the bank, as evidenced by the pass-book, when written up by the bank, and the surrender of the vouchers, but devolved such verification upon his clerk, Berlin, the acts and omissions of Berlin, in pursuance of such duty, are the acts and omissions of Mr. Cooper, and that under such circumstances he and the plaintiffs are in law estopped from denying the absolute correctness of such balancings, because otherwise injury would result to the defendant.

His honor, the said judge, however, refused so to direct a
91 verdict for the defendant, to which refusal the defendant's counsel then and there duly excepted.

The counsel for the defendant then requested his honor, the said judge, to charge the jury as follows, to wit:

"That the defendant was bound to know the genuineness of the signature of its customer, Mr. Cooper, to any check, but was not bound to know the handwriting, or want of genuineness of the filling up of any such checks."

His honor, the said judge, refused so to instruct the jury, to which refusal the defendant's counsel then and there duly excepted. The defendants' counsel also requested his honor, the said judge, to charge the jury as follows, to wit:

"The defendant can only be held liable on the first cause of action (beyond the admitted balance of $141.91), if the jury find that the alleged alterations or raisings of the checks in ques-
92 tion were so apparent as not to escape the observation of a prudent business man exercising ordinary care. If the alleged alterations or raisings were not of such a character the plaintiffs cannot recover on the first cause of action, save as to the admitted balance of $141.91, and also asked permission to go to the jury upon the questions of fact involved in such request."

His honor, the said judge, however, refused to instruct the jury as so requested, or to permit the counsel for the defendant to go to the jury upon the questions of fact involved therein; to which several rulings the counsel for the defendant then and there duly and separately excepted.

The counsel for the defendant then requested his honor, the said judge, to charge the jury as follows, to wit:

"It was the duty of Mr. Cooper, under the circumstances disclosed by the evidence, to act with that ordinary diligence and care
93 which prudent business men generally bestow in such cases, in the examination and comparison of the credits and debits contained in his bank or pass-book, in order to detect any errors or mistakes therein."

His honor, the said judge, however, refused so to instruct the

jury; to which refusal the defendant's counsel then and there duly excepted.

The defendant's counsel then requested his honor, the said judge, to charge the jury as follows, to wit: "The respective balancings of Mr. Cooper's account into his pass-book and the surrender of the vouchers by the defendant made October seventh, 1880, November twentieth, 1880, and January eighteenth, 1881, constituted severally accounts stated, and are *prima facie* binding and conclusive on Mr. Cooper and on the plaintiffs." His honor, the said judge, however, refused so to instruct the jury; to which refusal the defendant's counsel then and there duly excepted.

94 The defendant's counsel then requested his honor, the said judge, to charge the jury as follows, to wit: "Such respective balancings are absolutely conclusive on Mr. Cooper and the plaintiffs, and their correctness cannot be questioned, if the jury find that Mr. Cooper negligently omitted any reasonable examination of said balancing and vouchers, and that by such means injury has resulted to the bank, which it would not have suffered if such examination had been made, and the bank had received timely notice of objections." And also asked permission to go to the jury upon the questions of fact involved in such request.

His honor, the said judge, however, refused to instruct the jury as so requested, or to permit the counsel for the defendant to go to the jury upon the questions of fact involved therein;

95 to which several rulings the counsel for the defendant then and there duly and separately excepted.

The counsel for the defendant then requested his honor, the said judge, to charge the jury as follows, to wit: "If the jury find that Mr. Cooper could, on the rendition of such balancings, have readily ascertained the alleged raisings or alterations, either by the comparison of the number of returned vouchers handed him by his clerk with the number of such vouchers stated in said balancings in his bank pass-book, or by the comparison of the returned vouchers with the stub of his check-book, or by the comparison of such vouchers with the entries in the bank pass-book, and that the bank would not have suffered loss subsequent to such comparisons, if any of the same had been made, and the bank had received timely notice of objection to its accounts as rendered, the

96 plaintiffs cannot recover such subsequent loss." And also asked permission to go to the jury upon the questions of fact involved in such request.

His honor, the said judge, however, refused to instruct the jury as so requested, or to permit the counsel for the defendant to go to the jury upon the questions of fact involved therein; to which several rulings the counsel for the defendant then and there duly and separately excepted.

The counsel for the defendant then requested his honor, the said judge, to charge the jury as follows, to wit: "If on the rendition of the balancing of Mr. Cooper's account on October 7th, 1880, he could have ascertained by any of the modes mentioned in the preceding request the raising or alteration of the only two checks up to that

time raised or altered (amounting in all to only $800), and
97 neglected so to do, and if the jury find that if Mr. Cooper had done so and informed the bank accordingly, the latter would, in the exercise of ordinary prudence, have taken the legal and necessary steps to have prevented any further loss by the wrongful act of the clerk, Berlin, then the plaintiffs cannot recover for any loss arising subsequent to October 7th, 1880." And also asked permission to go to the jury upon the questions of fact involved in such request. His honor, the said judge, however, refused to instruct the jury as so requested, or to permit the counsel for the defendant to go to the jury upon the questions of fact involved therein; to which several rulings the counsel for the defendant then and there duly and separately excepted.

The counsel for the defendant then requested his honor, the said judge, to charge the jury as follows, to wit:

98 "Nor can the plaintiffs recover for the loss accruing prior to October 7, 1880, to wit, the sum of $800, if the jury find that by the means above alluded to Mr. Cooper could have discovered the alterations, and on such discovery failed to notify the bank thereof, and thereby prevented it from taking necessary legal measures for the recovery of said $800." And also asked permission to go to the jury upon the questions of fact involved in such request.

His honor, the said judge, however, refused to instruct the jury as so requested, or to permit the counsel for the defendant to go to the jury upon the questions of fact involved therein; to which several rulings the counsel for the defendant then and there duly and separately excepted.

The counsel for the defendant then requested his honor, the said judge, to charge the jury as follows, to wit: "If the jury
99 find that, from carelessness or indifference to the rights of the rights of the bank, Mr. Cooper failed to inform himself, from sources of information readily accessible to him, of the fact that the alleged alterations had been made, and if the jury find that the bank acted in honoring and paying checks after the 7th day of October, 1880, in reference to the conduct of Mr. Cooper in failing to make known to it any objection to the account, as stated and balanced in the bank-book on October 7, 1880, and that such omission and neglect of Mr. Cooper did, in fact, mislead the bank into the error of paying the alleged altered checks subsequent to said October 7, 1880, then the plaintiffs and Mr. Cooper are both estopped from questioning the correctness of the several balancings subsequent to October 7, 1880, and the plaintiffs are only entitled to recover
100 the sum of $800, with interest, besides the admitted balance of $141.91 on the first cause of action." And also asked permission to go to the jury upon the questions of fact involved in such request. His honor, the said judge, however, refused to instruct the jury as so requested, or to permit the counsel for the defendant to go to the jury upon the questions of fact involved therein; to which rulings the counsel for the defendant duly and separately excepted.

The counsel for the defendant then requested his honor, the said

judge, to charge the jury as follows, to wit, "If the jury find that the clerk, Berlin, was employed by the said Cooper as his agent for certain purposes, and among other things to fill up the body of checks drawn on defendant, to make deposits in the defendant's bank, and draw monies therefrom, and that the defendant
101 knew such facts, they must find for the defendant on the first cause of action, save as to the admitted balance of $141.91, unless they find that there were facts connected with such checks, or the presentation thereof, would have excited the suspicions of a business man exercising ordinary care." And also asked permission to go to the jury upon the questions of fact involved in such request.

His honor, the said judge, however, refused to instruct the jury as so requested, or permit the counsel for the defendant to go to the jury upon the questions of fact involved therein; to which several rulings the counsel for the defendant then and there duly and separately excepted.

The counsel for the defendant then requested his honor, the said judge, to charge the jury as follows, to wit, "If the jury find that the body of the alleged raised or altered checks was filled up
102 in the handwriting of the said Berlin, and that they were then signed by the said Cooper and left in the hands of Berlin as his agent, that the same were altered by the said Berlin while so in his possession and in Mr. Cooper's office, that they were presented for the payment to the defendant by the said Berlin in the apparent course of his employment and agency, and the body of them was, when so presented, wholly in the handwriting of Berlin and in the same condition as when they left Mr. Cooper's office, the said Cooper is bound by the terms of such checks when so presented, and as to them plaintiff's cannot recover." And also asked permission to go to the jury upon the questions of fact involved in such request.

His honor, the said judge, however, refused to instruct the jury as so requested, or to permit the counsel for the defendant to
103 go to the jury upon the questions of fact involved therein; to which several rulings the counsel for the defendant then and there duly and separately excepted.

The counsel for the defendant then requested his honor, the said judge, to charge the jury as follows, to wit: "Where one of two innocent parties must suffer by the acts of a third party, he should bear the loss who has reposed confidence in such third party."

His honor, the said judge, however, refused so to instruct the jury; to which refusal the defendant's counsel then and there duly excepted.

The counsel for the plaintiffs then requested his honor, the said judge, to direct the jury to render a verdict for the plaintiffs on both causes of action, amounting to the sum of $10,327.35
104 principal, and $413.74 interest, being a total of $10,741.09. And thereupon his honor, the said judge, delivered his opinion as follows:

"I shall have to rule against the defendant on the various propositions made in its behalf, although some of them are correct in the

abstract. I must rule, upon the evidence, that the plaintiffs are entitled to recover the full amount claimed in the complaint.

My judgment is that Mr. Cooper was under no duty to the bank in reference to the examination of the monthly balances and statements of account returned in the pass-books. He may have been under a duty to himself, perhaps, to see that the bank kept his accounts correctly; but I think he had a right to rely, if he so chose, upon the accuracy of the accounts as rendered by the bank, and that he is not to be charged with any liability because he
105 failed to scrutinize them, and I think that is the light in which ordinary business men would regard the transaction.

Now, if Mr. Cooper was not under any duty to the bank, there is no estoppel. If he was not under any duty to the bank, to examine the account, the bank had no right to assume that he would examine it. That being so, there is nothing in the position of the bank which entitles it to take advantage of any negligence or looseness of business conduct on his part. The only effect of receiving a statement of account and keeping it without objection, is to confer upon it the legal character of an account stated.

The rules which apply to an account stated have been greatly modified in recent jurisprudence; there is nothing conclusive now about such an account.

It may always be explained. The party who has received
106 it may show that it is erroneous, although he neglected to examine it. There are some expressions in the books to the effect that it would be conclusive if, by the exercise of due diligence, he might have discovered the negligence. I do not think that is now the law. Undoubtedly, if Mr. Cooper had examined these statements, and had discovered the fact that checks were being sent to the bank which he had not authorized, and upon inquiry had ascertained that this was the work of his clerk, and had then kept silence, he would have been responsible for the conduct of the clerk, on the theory of ratification. There can be no ratification without knowledge of the facts.

To which opinion and decision of his honor, the said judge, the counsel for the defendant then and there duly accepted.

And his honor, the said judge, thereupon continued his
107 opinion as follows, to wit:

As to the second cause of action, I hold, in view of the special endorsement upon the check, that the bank was not authorized to pay the money to Berlin. To which opinion and decision of his honor, the said judge, the counsel for the defendant then and there duly excepted.

And thereupon his honor, the said judge, did direct the jury to render a verdict for the plaintiffs in the sum of $10,741.09; to which ruling and direction the defendant's counsel then and there duly excepted.

And because none of the said exceptions so offered and made to the rulings, decisions, and opinion of his honor, the said judge, do

appear upon the record at the said trial; therefore, on the prayer of the said defendant, by his counsel, his honor, the said judge, hath to this bill of exceptions affixed his hand and put his seal,
108 this eighth day of December, in the year one thousand eight hundred and eighty-one.

WILLIAM J. WALLACE. [SEAL.]

The within case is correctly engrossed.
Ap'l 7, 1882.
(S'gd) PLATT & BOWERS,
Pff's Att'y.

(Endorsed:) U. S. circuit court, southern district of New York. Edmond Charles Morgan *et als. versus* The Leather Manufacturers' National Bank of New York. Bill of exceptions. N. B. Sanborn, defendant's attorney, 29 Wall street, New York city. U. S. circuit court. Filed Apr. 13, 1882. Joseph M. Deuel, clerk.

109 Circuit Court of the United States for the Circuit and Southern District of New York.

Know all men by these presents, that we, The Leather Manufacturers' National Bank of New York, William H. Macy, of the city, county, and State of New York, and William Rockefeller, of the said city of New York, are held and firmly bound unto Edmond Charles Morgan, William Thomas Berners, and Thomas Percy Fox in the sum of twenty-three thousand dollars, to be paid to the said Edmond Charles Morgan, William Thomas Berners, and Thomas Percy Fox, their and each of their executors and administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our successors, heirs, executors, and administrators, firmly by these presents. Sealed with our seals,
110 and dated the twenty-eighth day of April, one thousand eight hundred and eighty-two.

The condition of this obligation is such, that whereas the said Edmond Charles Morgan, William Thomas Berners, and Thomas Percy Fox have recovered a judgment in the circuit court of the United States for the southern district of New York against the said Leather Manufacturers' National Bank for the sum of eleven thousand and forty-three dollars and eighty cents, which said judgment was rendered on the seventeenth day of April, one thousand eight hundred and eighty-two;

And whereas the said Leather Manufacturers' National Bank, in order to obtain a reversal of the same, hath sued out a writ of error to the Supreme Court of the United States:

Now, therefore, if the above named The Leather Manufact-
111 urers' National Bank shall prosecute its said writ of error to effect, and shall answer all damages and costs, including just damages for delay and costs and interest on the appeal, and pay the said judgment if it shall fail to make good its plea, then this obliga-

tion shall be void; otherwise the same shall remain in full force and virtue.

LEATHER MANUFACTURERS' NATIONAL BANK, [SEAL.]
N. F. PALMER, *Pres't.*
WM. H. MACY. [SEAL.]
WM. ROCKEFELLER. [SEAL.]

Executed and delivered in presence of—
CHARLES F. AUKAMP.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

William H. Macy, one of the sureties to the foregoing bond,
112 being duly affirmed, says: That he is a resident and freeholder within the State of New York, and is worth twice the sum specified in the above bond over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

(S'g'd) WM. H. MACY.

Affirmed to before me, this 28th day of April, 1882.
[SEAL.] CHARLES F. AUKAMP,
Notary Public, Kings County.

Certificate filed in New York county.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

William Rockefeller, one of the sureties to the foregoing bond, being duly sworn, says: That he is a resident and freeholder within the State of New York, and is worth twice the sum specified
113 in the above bond over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

(S'g'd) WM. ROCKEFELLER.

Sworn to before me, this 28th day of April, 1882.
[SEAL.] CHARLES F. AUKAMP,
Notary Public, Kings County.

Certificate filed in New York county.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

I certify that on this twenty-eighth day of April, 1882, before me appeared the above-named William H. Macy and William Rockefeller, known to me, and to me known to be the individuals described in and who executed the above bond, and they severally to me acknowledged that they executed the same.

114 And on the same day also before me personally came Nicholas F. Palmer, president of the Leather Manufacturers' National Bank of New York, to me known, who, being by me duly sworn, did depose and say: That he resided in the city of New York;

that he was the president of the Leather Manufacturers' National Bank of New York; that he knew the corporate seal of the said bank; that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed by order of the board of directors of the said bank; and that he signed his name thereto by the like order as president of the said Leather Manufacturers' National Bank.

[SEAL.] CHARLES F. AUKAMP,
Notary Public, Kings County.

Certificate filed in New York county.

115 (Endorsed:) U. S. circuit court, southern district of New York. Edmond Charles Morgan *et als.* against The Leather Manufacturers' National Bank. Bond. N. B. Sanborn, defendant's attorney, 29 Wall street, New York city. The within bond approved as to form and sufficiency. Ap'l 29, 1882. (S'g'd) Addison Brown, U. S. D. J. U. S. circuit court. Filed Apr. 29, 1882. Joseph M. Deuel, clerk.

116 UNITED STATES OF AMERICA, *ss:*

To Edmond Charles Morgan, William Thomas Berners, and Thomas Percy Fox, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The Leather Manufacturers' National Bank is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this 29th day of April, in the year of our Lord one thousand eight hundred and eighty-two.

ADDISON BROWN,
U. S. D. J.

117 [Endorsed:] U. S. circuit court, southern district of New York. Edmond Charles Morgan *et als.* against The Leather Manufacturers' National Bank. Citation. N. B. Sanborn, defendant's attorney, 29 Wall street, New York city. Due and timely service of the within citation is hereby admitted. Dated April 29, 1882. Platt & Bowers, att'ys pl'ff & resp'd't. U. S. circuit court, May —, 1882. Joseph M. Deuel, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 307. The Leather Manufacturers' National Bank, plaintiff in error, *vs.* Edmond Charles Morgan, William Thomas Berners, and Thomas Percy Fox. Filed 6th October, 1882.

Supreme Court of the United States

OCTOBER TERM, 1885.

117-96

No. 45.

THE LEATHER MANUFACTURERS' NATIONAL BANK,

Plaintiff in Error,

vs.

EDMOND CHARLES MORGAN, WILLIAM THOMAS BERNERS and THOMAS PERCY FOX,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR

CHARLES M. DA COSTA,
NOEL B. SANBORN,
For Plaintiff in Error.

Supreme Court of the United States.

IN ERROR TO THE CIRCUIT COURT OF THE U. S.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

OCTOBER TERM, 1885.

THE LEATHER MANUFACTURERS' NATIONAL BANK,
Plaintiff in Error,

vs.

EDMOND CHARLES MORGAN, WILLIAM THOMAS BERNERS and THOMAS PERCY FOX,
Defendants in Error.

No. 45.

Brief for Plaintiff in Error.

THE CASE.

The complaint (under the New York Code) contains two causes of action—the first for an alleged balance of moneys of the defendants in error (the plaintiffs below) on deposit with the plaintiff in error (the defendant below), amounting to $9,996.38 (Record, fols. 10--12); and the second for the recovery of the sum of $280.97, the amount of a check alleged to have been deposited by, but not credited to, the defendants in error (Record, fols. 12–14).

The answer to the first cause of action, relying on numerous accounts stated by the balancings of the pass-book of the defendants in error, and the return to them of the cancelled checks as

vouchers (Record, fols. 19–25), avers that only the sum of $141.91 remains due, the payment of which has never been demanded or required (Record, fol. 25).

The answer to the second cause of action avers that the check for $280.97, alleged to have been endorsed for deposit only, was in fact endorsed in blank, and was properly paid to the person presenting the same (Record, fols. 25–26).

The case was tried before Circuit Judge Wallace and a jury.

At the close of the case, the Court refused to direct a verdict, on either cause of action, in favor of the bank—refused to charge any of the requests presented on its behalf—refused to permit it to go the jury on the questions of fact involved in some of such requests, and directed a verdict in favor of the defendants in error for the full amount claimed, with interest. To all and each of such rulings exceptions were severally duly taken.

The case, as it appears in the bill of exceptions, in which the evidence on both sides is set forth, is as follows:

The defendants in error compose the firm of Ashburner & Co., of Calcutta. Their general agent in the United States was Mr. William B. Cooper, Jr., who in 1877 opened an account with the plaintiff in error—a bank in the City of New York—in the name of "*W. B. Cooper, Jr., agent for Ashburner & Co.*" (testimony of witness Cooper, Record, fol. 69). Mr. Cooper had been a dealer with the bank for upwards of eighteen years, and knew that it was its custom, as well as the custom of all other banks, to balance, at intervals, the pass-books of its depositors, and to return the same when balanced, accompanied by the checks drawn by such depositors, and charged to their accounts, as the vouchers of the bank for such payments (testimony of witness Cooper, Record, fol. 80).

On the 1st of January, 1878, one C. Clifford Berlin entered

into the employment of Mr. Cooper, agent as aforesaid of Ashburner & Co., and remained in his employment until March, 1881. During all of such time Berlin occupied the position of a confidential clerk, keeping all the books, *including the check-book, and having charge of the bank account* kept by said Cooper, as agent, with the plaintiff in error. *He filled up the body of all the checks*, but did not sign them, entered such checks on the stubs of his employer's check book, such entries being made to correspond with the checks, and containing the date when drawn, the name of the payee, the amount, and the purpose for which each check was drawn, *and balanced such check-book with the pass-book and returned checks, whenever the account was balanced and returned by the bank, accompanied by the checks drawn by Mr. Cooper as vouchers.* Mr. Cooper himself took no part in such examination and balancings (testimony of witness Berlin, Record, fols. 52–53).

Mr. Cooper's testimony in this regard was to the effect that his account with the bank was balanced from time to time, which was done by the bank's writing up the pass-book, and returning the checks paid by it—that, when the pass-book was so returned, *it went to the clerk Berlin, who then balanced the check-book—that being one of the duties imposed upon him*—and that he, Cooper, took no part in such balancing (Record, fol. 70)—that he never compared his pass-book, when balanced by the bank and returned to him with the vouchers, with the stubs of his check-book, but that *he devolved the duty of so doing on his clerk Berlin* (Record, fol. 81).

Between the 11th of September, 1880, and the 13th of February, 1881, Berlin filled up, in the regular course of business, among many others, the thirteen checks hereinafter enumerated, and, after obtaining Mr. Cooper's signatures thereto, altered

them before they left Mr. Cooper's office by increasing their respective amounts and by making such of them as were drawn to order payable to bearer, and then had them cashed by the bank (Record, fol. 54). The original amounts for which such checks were drawn were delivered by Berlin to Mr. Cooper, or paid to his use, and the excess was retained by Berlin, and appropriated to the payment of his gambling debts (Record, fol. 54).

The differences in amount and otherwise between the checks as drawn and as altered and cashed are as follows:

NO. OF CHECK.	DATE OF CHECK.	CHARACTER OF ALTERATION.
8356	Sept. 11, 1880	Check to cash or bearer, raised from $90 to $500.
8377	Sept. 28, 1880	Check to cash or bearer, raised from $10 to $400.
8424	Oct. 30, 1880	Check to cash or bearer, raised from $105 to $405.
8431	Novr. 3, 1880	Check to cash or bearer, raised from $17.25 to $600.25.
8468	Novr. 26, 1880	Check to cash or bearer, raised from $10 to $1,000.
8480	Dec. 10, 1880	Check to order of Marston & Son, raised from $7.75 to $700.25, and words "or bearer" written in after payee's name.
8492	Dec. 18, 1880	Check to order of C. H. Clayton, raised from $15 to $1,500, and words "or bearer" written in after payee's name.
8498	Dec. 24, 1880	Check to cash or bearer, raised from $80 to $600.
8501	Dec. 28, 1880	Check to order of W. S. Daland, raised from $24.08 to $1,000, and words "or bearer" written in after payee's name.
8504	Dec. 31, 1880	Check to cash or bearer, raised from $80 to $400.
8508	Jany. 5, 1881	Check to cash or bearer, raised from $10 to $2,000.
8518	Jany. 14, 1881	Check to order of Charles G. Hanks, raised from $33.60 to $1,100, and words "or bearer (duty)" written in after payee's name.
8550	Feby. 13, 1881	Check to order of W. S. Daland, raised from $17.72 to $100.72 and words "or C. Clifford Berlin" written in after payee's name.

The clerk Berlin was well known to the paying teller of the bank as the representative of Mr. Cooper (Record fol. 61). He made all the erasures and alterations in the office of Mr. Cooper with great care, and such erasures and alterations could not be detected without a very careful scrutiny, or a very close and careful examination (Testimony of witness Berlin, Record, fol. 64).

The entries made by Berlin in the stubs of the check-book were always correct, and contained the amounts for which the checks had been originally drawn before alteration and, in order to conceal such alteration, he forced the footings of the stubs by making false additions equal in amount to the increase of the checks as altered (Berlin's Testimony, Record, fol. 56–57).

Mr. Cooper's bank-book was balanced on the 7th of October, 1880. In such balancing were charged and as vouchers returned the two altered checks Nos. 8356 and 8377. These checks, as originally drawn, were both payable to bearer. The former, originally for $90, was raised to $500; the latter, originally for $10, was raised to $400; the total difference being $800. Mr. Cooper's check-book did not show that any check for $400 or $500 had been drawn between the preceding balancing and the said 7th day of October, 1880, or that, at the time of the preceding balancing, any check for either of such amounts was then outstanding and unpaid.

Mr. Cooper's bank-book was again balanced on the 20th of November, 1880. In such balancing were charged and as vouchers returned the two altered checks Nos. 8424 and 8431, respectively for $405 and $600.25, both payable to bearer, and raised respectively from $105 and $17.25, the total difference being $883. Mr. Cooper's check-book did not show that any check for $405, or for $600.25 had been drawn between the

preceding balancing of October 7, 1880, and the 20th of November, 1880, or that at the time of such preceding balancing, any check for either of such amounts was then outstanding and unpaid.

Mr. Cooper's bank-book was again balanced on the 18th of January, 1881. In such book were charged, and as vouchers returned, the seven altered checks Nos. 8468, 8480, 8492, 8498, 8501, 8504, 8508, respectively for $1,000, $700.25, $1,500, $600, $1,000, $400, and $2,000, while the original amounts for which such checks were drawn, as appeared by the check-book, were, respectively, $10, $7.75, $15, $80, $24.08, $80, and $10, making a difference of $6,973.42. Mr. Cooper's check-book did not show that any checks for such raised amounts had been drawn between the date of the last balancing, *i. e.*, 20th of November, 1880, and the said 18th of January, 1881, (except that there appeared an additional check for $600, which also appeared on the credit side), or that at the time of such preceding balancing any check for either of such amounts was then outstanding and unpaid (Berlin's Testimony, Record, fols. 62–64).

Mr. Cooper knew on the day or within a few days after each of said balancings, that his pass-book had been balanced and the vouchers returned (Berlin's Testimony, Record, fol. 58).

About the 1st or 2d of March, 1881, Berlin remained away from the office for a day, and, during his absence, Mr. Cooper discovered the alterations in the checks in the following way: He compared the entries in his pass-book with the stubs of his check-book, and discovered that a certain number of checks appearing on such stubs were not charged against him in his pass-book, and did not appear to have been returned by the bank, while others, appearing on his pass-book to have been charged against him, and which were returned, did not appear

by the check-book ever to have been drawn. He thereupon sent his pass-book to the bank to be balanced. It was so balanced on the 2d of March, 1881, and, among the vouchers then returned, were checks Nos. 8518 and 8550 respectively dated January 14 and February 13, 1881 (the former of which not included in the last balancing of January 18, 1881), and which had been raised from their original amounts of $33.60 and $17.72 to $1,100 and $100.72 (Cooper's Testimony, Record, fol. 77).

Mr. Cooper thereupon notified the Bank that his clerk had absconded—that alterations had been made in his checks, and he requested it to cash no more of his checks which were filled up in the handwriting of his clerk Berlin, testifying that he gave such notice *for his own protection, as well as for that of the bank* (Cooper's Testimony, Record, fols. 78–9).

If, on any day after October 7, 1880, Mr. Cooper had made an examination to verify the balancings of his pass-book, similar to the one he made on or about the 1st or 2d of March, 1881, he would have readily discovered the two altered checks Nos. 8356 and 8377, which had then been returned as vouchers, the alterations in which amounted in the aggregate to $800. If, on any day after November 20, 1880, he had made a similar examination to verify the correctness of the balancings of his pass-book, he would have readily discovered that among the vouchers returned were two altered checks, Nos. 8424 and 8431, the alterations in which amounted in the aggregate to $883. If he had on any day after January 18, 1881, made a similar examination to verify the correctness of the balancings of his pass-book, he would have easily discovered the seven altered checks, which had been returned as vouchers, numbered Nos. 8408, 8480, 8492, 8408, 8501, 8504 and 8508, the total of the

alterations in which amounted to $6,973.42 (Cooper's Testimony, Record, fols. 79–81).

Thereafter Mr. Cooper demanded from the bank the payment of the differences between the checks as originally drawn, and as altered by his clerk Berlin and paid by the bank, and offered to surrender only two of such altered checks, stating that the others had been destroyed by Berlin (Cooper's Testimony, Record, fol. 81).

The difference so claimed by Mr. Cooper is the basis of the first cause of action in the complaint.

The second cause of action in the complaint is based on a genuine check for $280.97, paid by the bank to Berlin, and the only question arising thereon is whether or not its endorsement authorized its payment to bearer (Record, fols. 82 and 83).

The witnesses examined on behalf of the defendants in error were the clerk Berlin and Mr. Cooper—the former's testimony being taken *de bene esse* in Delaware.

On behalf of the bank there were examined Mr. Butler, the paying teller, who testified that he knew Berlin as the clerk of Mr. William B. Cooper, agent for Ashburner & Co., and that Berlin was in the habit of coming to the bank with Mr. Cooper's checks both for payment and deposit, and that there was nothing unusual in his presenting for payment checks payable to bearer. He also testified as to the careful manner in which he examined each of Mr. Cooper's checks, and stated that he discovered nothing on their face to indicate erasure or alteration, and that, if he had discovered anything of the kind, he would not have paid the check (Record, fols. 84–85).

Mr. Holden, the cashier of the bank, testified that, if Mr. Cooper had, on or about October 7, 1880, informed the bank that two of the vouchers then returned by it and charged

Mr. Cooper's account in the balancing of his pass-book on that day, had been raised or altered, the bank would have given directions to its tellers not to pay any of Mr. Cooper's checks, which were filled up in the handwriting of Berlin, and would have taken measures to arrest the latter, and to recover the amounts overpaid on such raised checks. And he gave similar testimony with reference to the subsequent balancings of November 20, 1880, and January 18, 1881 (Record, fols. 86–88).

Both parties having rested, the counsel for the plaintiff in error asked the Court to direct the jury to find a verdict in its favor on the second cause of action, on the ground that the plaintiff in error was authorized to pay the amount of the said check to Berlin, or to any one else who presented the same for payment, the endorsement thereon amounting only to an endorsement in blank.

The Court refused so to direct the jury, to which refusal an exception was duly taken (Record, fols. 88–89).

The counsel for the plaintiff in error then requested the Court to direct the jury to render a verdict in its favor on the first cause of action (except as to the admitted balance of $141.91), on the ground that, as it appeared by Mr. Cooper's testimony that he did not personally verify the accounts between himself and the bank, as evidenced by the pass-book when written up by the bank and the surrender of the vouchers, but devolved such verification upon his clerk Berlin, the acts and omissions of Berlin, in pursuance of such duty, are the acts and omissions of Mr. Cooper, and that, under such circumstances, he and the defendants in error are in law estopped from denying the absolute correctness of such balancings, because otherwise injury would result to the bank.

Which direction the Court refused to give. To which refusal an exception was duly taken (Record, fols. 90–91).

The counsel for the plaintiff in error then asked the Court to charge certain requests to the jury, and to permit the bank to go to the jury upon the questions of fact involved in some of them. Each of which requests the Court declined to charge, and also declined to permit the bank to go to the jury on the questions of fact involved therein. To which refusals exceptions were severally duly taken. The requests are set out in full in the bill of exceptions (Record, fols. 91–94), and in the assignment of errors, and need not, therefore, be here specifically repeated.

The Court thereupon, on motion of the counsel for the defendants in error, directed the jury to find a verdict in their favor for the full amount claimed on both causes of action, assigning, as reasons for its ruling, so far as the first cause of action was concerned.

"That Mr. Cooper was under no duty to the bank in reference to the examination of the monthly balances and statements of account returned in the pass books."

And as to the second cause of action,

"That, in view of the special endorsement upon the check, the bank was not authorized to pay the money to Berlin."

To the direction so given to the jury, as well as to the opinion and reasons therefor, exceptions were severally duly taken (Record, fols. 104 to 108).

To reverse the judgment so entered on the verdict of the jury a writ of error was duly sued out.

ASSIGNMENT OF ERRORS.

The Court below erred—

1. In refusing to direct the jury to find a verdict in favor of the plaintiff in error on the first cause of action set out in the complaint, except as to the admitted balance of $141.91 (Record, fols. 90 and 91).

2. In refusing to charge the jury that it was the duty of Mr. Cooper, under the circumstances disclosed by the evidence, to act with that ordinary diligence and care, which prudent business men generally bestow in such cases, in the examination and comparison of the credits and debits contained in his bank or pass-book, in order to detect any errors or mistakes therein (Record, fol. 93).

3. In refusing to charge the jury that the respective balancings of Mr. Cooper's account into his pass-book, and the surrender of the vouchers by the plaintiff in error, made October 7, 1880, November 20, 1880, and January 18, 1881, constituted severally accounts stated, and were *prima facie* binding and conclusive on Mr. Cooper and on the defendants in error (Record, fol. 93).

4. In refusing to charge the jury that such respective balancings were absolutely conclusive on Mr. Cooper and the defendants in error, and their correctness could not be questioned, if the jury found that Mr. Cooper negligently omitted any reasonable examination of said balancings and vouchers, and that by such means injury had resulted to the bank which it would not have suffered if such examination had been made, and the bank had received timely notice of objections (Record, fols. 94 and 95).

5. In refusing permission to the plaintiff in error to go to the jury upon the questions of fact involved in the preceding prayed for instruction (Record, *ibid*).

6. In refusing to charge the jury that, if they found that Mr. Cooper could, on the rendition of such balancings, have readily ascertained the alleged raisings or alterations, either by the comparison of the number of returned vouchers handed him by his clerk with the number of such vouchers stated in said balancings in his bank pass-book, or by the comparison of the returned vouchers with the stub of his check-book, or by the comparison of the returned vouchers with the entries in the bank pass-book, and that the bank would not have suffered loss subsequent to such comparisons, if any of the same had been made, and the bank had received timely notice of objection to its accounts as rendered, the defendants in error could not recover such subsequent loss (Record, fols. 95–96).

7. In refusing permission to the plaintiffs in error to go to the jury upon the questions of fact involved in the preceding prayed for instruction (Record, *ibid*).

8. In refusing to charge the jury that, if, on the rendition of the balancing of Mr. Cooper's account on October 7, 1880, he could have ascertained by any of the modes mentioned in the preceding assignment of error the raising or alteration of the only two checks up to that time raised or altered (amounting in all to only $800), and neglected so to do, and, if they found that, if Mr. Cooper had done so, and informed the bank accordingly, the latter would, in the exercise of ordinary prudence, have taken the legal and necessary steps to have prevented any further loss by the wrongful act of the clerk Berlin, then the defendants in error could not recover for any loss arising subsequent to October 7, 1880 (Record, fol. 97).

10. In refusing permission to the plaintiff in error to go to the jury upon the questions of fact involved in the preceding ...yed for instructions (Record, *ibid*).

10. In refusing to charge the jury that the defendants in ...or could not recover for the loss accruing prior to October 1880, to wit, the sum of $800, if the jury found that, by the ...eans above alluded to, Mr. Cooper could have discovered the alterations, and on such discovery failed to notify the bank thereof, and thereby prevented it from taking necessary legal measures for the recovery of the said $800 (Record, fol. 98).

11. In refusing permission to the plaintiff in error to go to the jury upon the questions of fact involved in the preceding prayed for instruction (Record, *ibid*).

12. In refusing to charge the jury that, if they found that from carelessness or indifference to the rights of the bank Mr. Cooper failed to inform himself, from sources of information readily accessible to him, of the fact that the alleged alterations had been made, and if they found that the bank acted, in honoring and paying checks after the 7th day of October, 1880, in reference to the conduct of Mr. Cooper in failing to make known to it any objection to the account as stated and balanced in the bank-book on October 7, 1880, and that such omission and neglect of Mr. Cooper did in fact mislead the bank into the error of paying the alleged altered checks subsequent to said October 7, 1880, then the defendants in error and Mr. Cooper were both estopped from questioning the correctness of the several balancings subsequent to October 7, 1880, and the defendants in error were only entitled to recover the sum of $800 with interest, besides the admitted balance of $141.91 on the first cause of action (Record, fols. 99–100).

13. In refusing permission to the plaintiff in error to go to the jury upon the questions of fact involved in the preceding prayed for instruction (Record, *ibid*).

14. In refusing to direct the jury to find a verdict in favor of the plaintiffs in error upon the second cause of action set out in the complaint (Record, fols. 88–89).

15. In directing a verdict for the defendants in error for the full amount claimed in the complaint on both causes of action (Record, fols. 104–107).

POINTS.

POINT I.

The principal question involved under the first cause of action in this case is one of signal practical importance, and its decision will necessarily affect the transactions of every bank in the United States with its depositors. The point presented has not heretofore been decided by this Court. In this view, it may not be inappropriate, at the outset, to advert to some well-established principles which, if applicable, may govern the determination of the case.

The contract between a bank and its depositor is the plain one of debtor and creditor. It has no element of trust; its character is in no sense fiduciary. Consequently the transactions of a bank with its depositors are governed by exactly the same rules as control ordinary contract relations.

In *Thompson* v. *Riggs*, 5 Wall., 663, 678, the rule is thus stated:

"Contracts between a banker and his customers are doubtless required to be performed, and must be construed in the same way as contracts between other parties."

So, also, in Bank of the Republic *v.* Millard, 10 Wall., 152, 155, this Court said:

"It is no longer an open question in this Court, since the decision in the cases of *The Marine Bank* v. *The Fulton Bank*, and of *Thompson* v. *Riggs*, that the relation of a banker and customer in their pecuniary dealings, is that of debtor and creditor . . . . the contract between the parties is purely a legal one, and has nothing of the nature of a trust in it."

And, to the same effect, see—

Phœnix Bank *v.* Risley, 111 U. S., 125, 127.

POINT II.

By custom and usage, the deposit of money in a bank is only evidenced by an entry contained in what is called a *pass-book* or *bank-book*, delivered by the bank to the customer, in which on the debtor side are entered all sums paid to or received by the bank on account of the customer. This book is retained by the depositor, who presents it to the receiving teller each time he makes a deposit, in order that such deposit may be entered therein. Thereupon, in the language of this Court in Bank of the Republic *v.* Millard, *supra*:

"The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him."

The bank is bound to know at its peril the signature of its depositor. As to the filling-in or body of the check, it owes no such duty, and it is only called upon to exercise ordinary care. If the signature is genuine, and nothing appears on the face of the check to excite particular notice or suspicion, it must honor all checks and pay them at once. Out of the exigencies of business intercourse grew this distinction between the signature and body of checks. This is elementary.

Thus in 2 Daniel on Negotiable Instruments (3d ed.), Sec. 1654 a, the author says:

"A bank is not bound to know more than the signature of the drawer of the check; for in the ordinary course of business the body of the check is as often as otherwise filled up by a clerk, and it is by no means a matter of suspicion that it is not filled up in the handwriting of the drawer. If the rule were otherwise, a bank could never safely pay a check filled up in a handwriting not the drawer's until it had inquired of the drawer whether it was properly filled up. And to require this would greatly embarrass commercial transactions."

See, also, *Espy* v. *Bank of Cincinnati*, 18 Wall., 604, at p. 619.

No question as to difference in handwriting, either as to signature or body of the checks, arises in this case. The signatures were all genuine, and the body of all the raised or altered checks was concededly in the handwriting of the clerk Berlin, who from the time the account sued on was opened with the plaintiff in error not only had charge of the bank account, but filled up "the body of all checks drawn on such account" (Record, fol. 53). So that, so far as the handwriting is concerned, the raised or altered checks were absolutely similar in all respects to all other checks. Nor was there anything on the face of the checks themselves to indicate alteration or to otherwise excite suspicion. As to this, Berlin testified that he made all the erasures and alterations in the various checks "with great care, and that such erasures and alterations could not be detected without a very careful scrutiny or a very close and careful examination." That this was so was further shown by the evidence of the paying teller of the bank, who testified that he carefully examined all these checks as to signatures, amounts, dates, &c., and also to see whether on their face anything appeared indicating erasure or alteration, but that he never at any time observed anything on any of Mr. Cooper's checks presented to him at the bank by the clerk Berlin for payment to excite or arouse his suspicion of any

erasure or alteration having taken place (Record, fols. 64, 85).

It is not asserted that an *altered* check is any the less a forgery because not capable of easy detection. The above, however, tends to demonstrate that there was no negligence on the part of the bank in honoring these checks, which were actually signed by its depositor, and the body of each of which was actually in the same handwriting of all his genuine checks. The bank, therefore, could only ascertain its mistake, or in that particular verify any of its acts, by inquiry of its depositor. He, and he alone, had the means of settling that question conclusively.

Moreover, as soon as the bank honored these checks, they became the property of Mr. Cooper. He had the legal right to demand their possession, the bank, until delivery to him, only holding them as his agent. This is clearly stated in Morse on Banks, &c. (2d edition), pp. 323, 324, the author using the following language:

"It is the custom with most banks, whenever the depositor sends his book to be balanced, to return to him with it all the checks received and paid to the date of the balancing. An obligation to do this might, perhaps, be inferred in most cases from the usage of business and the prior course of dealing between the bank and the depositor. For it is probable that the habit is almost universal, and it is one which may be properly adduced in evidence. But further than this, there is ground for holding that it is also a duty of the bank at common law to return his paid checks to the depositor. He is considered to have the better right to them, for they are regarded as his evidence of payment of his debt to the payee named in them. The bank is said to hold them only as his agent. * * * * * But at the same time, there seems to be authority as well as reason for saying, that if the general right of property is in the drawer, yet a qualified right of property, or it may more properly be called a temporary right of possession, exists in the bank. A paid check can only be the subject of any value whatsoever for the purpose of serving as an item of evidence. In this capacity it has a double purpose to subserve. It is proof that the drawer has paid his indebtednes to the payee, but it is likewise proof that the bank has paid the sum named on account of the drawer If the drawer is entitled to claim perpetual possession of it to protect him against the danger of a suit by

the payee, so the bank, before giving it to the drawer, is entitled to his *acknowledgment, express or implied, that it has rightfully paid that amount out of his credit or deposit.* For this reason the return of the check is usually contemporaneous with the balancing of the book, that is to say, with the statement of account rendered to the customer charging him with this item. Before the drawer can enforce delivery of the check to himself by the bank, he ought to be required, by his *acknowledgment of the bank's payment* to render the check no longer essential to the bank as its only evidence of that payment."

And within its reason, how much more ought the rule to apply when the greater part of the checks are, as in the case at bar, "cash" checks, for money presumably paid to the depositor himself.

This rule obtains likewise in England. In Walker's Banking Law, 90, 91, the author thus adverts to it:

"The custom of bankers is to return checks after cashing them to the drawer; and it has been said that a banker has no more right to retain a check which he has cashed than the payee, a bill of exchange which has been paid (Per Wilde, C. J., *Reg.* v. *Watts*, 2 Den. C. C. 14, 21. "It is, however, obvious that a cashed check is the banker's only voucher for the payment with which he has charged his customer."

Again, in Grant's Law of Banking (3d ed.), p. 84:

"When the banker hands back to the drawer of the cheque after it has been cashed by the banker, this restoration is not known as a return of the cheque. In fact, however, such restoration always takes place; the banker's duty being to return the cheque, after cashing it, to the drawer. A banker has no more right to a cheque, which he has honored, than the payee of a bill of exchange has to the bill when paid. It is always considered that the cheque is the property of the drawer when paid and in his possession; the banker, *for this purpose*, being his agent, the possession of the banker is therefore his possession."

To continue, for the purpose of obtaining his checks and of having his account balanced, the depositor at reasonable intervals—*e. g.*, in this case at intervals of from four to seven weeks—returns his pass-book to the bank. The account is then written up in this book, entering on the credit side the amount, item for item, of each check the bank may have honored as having been drawn by the depositor. The entries being made, the account is bal-

anced, and any balance still owing the depositor carried to the debit column. The bank then returns the pass-book to the depositor, together with the checks it has honored as its vouchers for each and every item of credit which it may have so entered. And in further abundant corroboration of the account so stated and of the actual return of the checks to the drawer, the bank usually writes or stamps across the face of the pass-book the number of checks, viz.: " —— VOUCHERS RETURNED" (Record, fols. 66–68).

The universal course of banking business makes these balancings the only general mode of stating and adjusting accounts between bankers and their depositors. No other settlement, statement or delivery of accounts, or any other transaction which can be regarded as the closing of an old or the opening of a new account, or as varying, renewing or confirming the credit on either side ever takes place in the ordinary course of business.

Bearing in mind the legal duty of the bank to return the checks and the circumstance that it usually can only then know conclusively whether or not each payment has been duly authorized, the question presents itself as to whether or not the depositor, in good faith and fair dealing and in the exercise of that degree of care and prudence ordinarily exercised by business men, ought not, as his duty to the bank, to examine the account so stated in his book, as also the checks returned to him. If there be no such duty, and if the bank cannot rely, when it returns the checks, upon the presumption that they will be examined and the account verified, then the balancing of the pass-book and return of the vouchers is a mere empty and idle ceremony of no practical significance whatever.

The plaintiff in error contends that there is a duty on the

depositor to examine the account and vouchers, and that if he fails and neglects to do so within a reasonable time after their return, he will be presumed to acquiesce in the account and to ratify the vouchers. This is eminently just: for himself, because if there are over-payments, the correction of any error will increase his credit; for the bank, because it will thus, at the earliest practical moment, be apprised of its mistake or of any frauds that may have been committed on it. Here, it was the only manner in which the bank could ascertain whether or not it had duly discharged its debt by honoring these altered checks. The admission of correctness constituted to the bank a complete ratification of its acts, so far as it was concerned. Any man of ordinary prudence in the conduct of his affairs would certainly make an examination of the vouchers returned. At least a very strong presumption would always exist that he had done so. The bank, of course, interpreted, and it had the right to interpret, Mr. Cooper's silence as an admission of the correctness of each entry, and as an acknowledgment and ratification of each of the bank's payments.

At least, each respective balancing would become an account stated, unless objected to within a reasonable time, and be binding as such. The result of this would be that the account would stand, as admitted to be correct.

Speaking to this point, this Court, in *Wiggins* v. *Burkham*, 10 *Wall.*, 129, 131, said:

> "The principle which lies at the foundation of evidence of this kind is, that the silence of the party to whom the account is sent warrants the inference of an admission of its correctness. This inference is more or less strong according to the circumstance of the case."

This inference of admission that the account is correct should be particularly strong and binding in the case of the balancing of a bank account, and return of the vouchers.

As Morse says, in the passage above quoted, the bank in giving the checks to its depositor is entitled to his acknowledgment, express or implied, that it has rightfully paid that amount out of his credit or deposit.

The same author says (p. 62, 2d ed.):

"Probably such time as the Courts should consider reasonable, upon consideration of the nature, course and amount of the dealings between the parties, would be held conclusive against the depositor. For after he has passed many successive balancings, for many months or years, having meantime had multitudinous transactions with the bank, it might fairly be deemed an unreasonable hardship if he could still be allowed to go back and litigate to correct an error which he has so long had the means of correcting, and which the bank might justly presume that any ordinarily careful person could not fail to have corrected long since."

In reference to this subject, Grant's Law of Banking, 3d ed., p. 228, contains the following:

"For the purpose of having the book made up by the bankers from their own books of account, the customer returns it to them from time to time; and, the proper entries being made by them up to the day on which it is left for that purpose, they hand it again to the customer, who thereupon may examine it, *and if there appears any error or omission, it is his business to send it back to be rectified; if he does not, his silence is regarded as an admission that the entries are correct.*"

POINT III.

It may thus be asserted that there is a duty growing out of the relations of the bank and its depositor which calls for an examination of the account and vouchers returned. The performance of that duty is in a certain sense an obligation which would be dictated by fair dealing as between man and man.

Mr. Cooper knew that he owed such obligation as a *duty* to the bank (Record, fol. 81). And that duty, as to the body or filling in of his checks, he should have performed with more than ordinary care, because, although for years he had known of vari-

ous means adopted by bankers and merchants to prevent the raisings or alterations of their checks, he had not employed or used any of such methods (*ibid.*).

The Court below, however, notwithstanding this, held that Mr. Cooper owed absolutely no duty to examine his returned checks or his pass-book. On this ruling turned the whole case.

That Mr. Cooper was under some duty in the premises cannot be reasonably doubted. Moreover, that has been expressly so decided.

In Hardy *v.* Chesapeake Bank, 51 Md., 562, 591, it was ruled:

> "What is such duty may not in all cases be easy to determine, but we think it not too much to say, that in a case like the present there is a duty owing from the customer to the bank to act with that ordinary diligence and care that prudent business men generally bestow in such cases, in the examination and comparison of the debits and credits contained in his bank or pass-book, in order to detect any errors or mistakes therein."

And expressly to the same effect was the ruling in—

Dana *v.* National Bank of the Republic, 132 Mass., 158.

American National Bank *v.* Bushey, 45 Mich., 140.

POINT IV.

There was ample evidence from which the jury could have properly inferred and found negligence on the part of Mr. Cooper.

Obviously, the most superficial examination made on any day after the respective balancings would have led to the discovery of the frauds, and consequent prevention of future injury to the bank. Cooper himself so testified (Record, fols. 79–80).

Mr. Cooper had been a dealer with the bank for upwards

of eighteen years. He knew that it was its custom, as well as the custom of all banks, to balance at intervals the pass-books of its depositors, and to return the same, when balanced, accompanied by the checks drawn by the depositor and charged to the account, "*as the vouchers of the bank for such payments*" (Record, fol. 80). On the day or within a few days after each of said balancings he knew that his pass-book had been balanced, and the vouchers returned (Record, fol. 58). In addition, he was in the habit of looking over and examining his check-book from time to time and kept track of the balance (Record, fols. 61, 71).

Besides, a mere glance at the pass-book would have shown him the number of vouchers returned and the balance stated. In each instance the number of checks returned is stated on the pass-book: On the balancing of October 7, "62 VOUCHERS RETURNED;" on the balancing of November 20, "79 VOUCHERS RETURNED;" on the balancing of January 18, "66 VOUCHERS RET'D." Therefore, had he at any time merely counted the vouchers, he could readily have noticed the absence of two on each of the first two balancings, and the absence of SEVEN on the 18th of January, out of a total of only 66—more than one-tenth. The simple counting of the checks, therefore, would have thus led to the discovery of the fact that some were absent.

Again, "he kept track of the balance," and "when he asked Berlin as to the balance his answer agreed with what he supposed was in the bank" (Record, fol. 70, 71), and yet the balance on the 7th of October (which after all was the same as in his check-book, Berlin having forced the balances) should have been $11,621.64 instead of $10,821.64; the balance on the 20th of November should have been $6,251.68 instead of $4,568.68; and the balance of the 18th of January should have been $14,222.19 instead of

$5,566.61. Does it not seem, therefore, incredible that a business man should for weeks and months be so ignorant of the standing of his account? He kept track, he says, of the balance and what he supposed was in the bank; but if he did so he must have been marvelously negligent not to have discovered the obvious deficit. There is no pretence that Berlin tampered with the pass-book; that the balances in the check-book were not the same as those stated in the pass-book. Berlin may have destroyed the altered checks, but the fact of such alteration and absence of the checks could at any time have been known by a simple examination. The least careful examination either of his pass-book or of his check-book would obviously have led to the instant detection of the errors.

In other words, ordinary care and attention would have led to early detection, and having the means of knowledge, Cooper's actual knowledge (or gross negligence in not knowing) will be presumed.

Wood *v.* Carpenter, 101 U. S., 135, 141.
Dannmeyer *v.* Coleman, 8 Sawyer, 51, 58.

Moreover, his attention was specifically drawn to the doctoring of his check-book, for he once discovered, during the period of these forgeries, an error in the footing and spoke to his clerk about it (Record, fol. 71). Had he further investigated then, instead of speaking to Berlin about it, he would have detected the frauds, which he so easily months afterwards detected when his clerk stayed away from the office for a day.

How applicable, then, must be the rule that whatever is notice enough to excite attention, put a party on his guard, or call for inquiry, is notice of everything to which such inquiry might have led.

This rule was reiterated by this Court in *Angle* v. *N. W. Mutual L. I. Co.*, 92 U. S., 330, 342, as follows:

"Constructive notice in such cases is held sufficient, upon the ground that, when a party is about to perform an act which he has reason to believe may affect the rights of third persons, an inquiry as to the facts is a moral duty, and diligence an act of justice. Whatever fairly puts a party upon inquiry in such a case is sufficient notice in equity, where the means of knowledge are at hand; and if the party, under such circumstances, omits to inquire, and proceeds to do the act, he does so at his peril, as he is then chargeable with all the facts which by a proper inquiry he might have ascertained."

POINT V.

The plaintiff in error does not contend that neglect or failure to examine the account so settled and balance struck and the vouchers returned would of itself constitute a bar to the depositor's subsequently, on discovering a mistake in the account, asserting his right to establish that mistake and recovering from the bank the amount thereof. Ordinarily, any delay of the depositor will not prejudice the bank, and the only effect of his apparent acquiescence will be to create an account stated, with the burden of proof on the depositor to impeach it. But it is confidently submitted that, if by reason of the delay or by reason of any negligence on the part of the depositor, the bank sustains substantial additional damage or loss, which it otherwise would not have sustained, the depositor is estopped from denying, what his conduct reasonably implies, viz., that the account was correct and the vouchers his genuine checks.

In the doctrine of account stated, if an element of estoppel exist, the account becomes unimpeachable. This principle is well stated by the Supreme Court of Minnesota in *Wharton* v. *Anderson*, 28 Minn., 301, 305, in the following language:

"There is some confusion in the books as to the precise effect of a stated account upon the rights of the parties, but we are inclined to the opinion that

it is only *prima facie* evidence of the correctness of the balance, and not conclusive upon it, *unless . * * * . . . some act has been done or forborne in consequence of the accounting, and relying upon it, which would put the party claiming the benefit of it in a worse position than, as though it had not been had, so as to bring the case within the principles of an estoppel in pais.*"

In the same connection, the Court of Appeals of New York, in laying down the true rule as to the effect of an account stated in Lockwood *v.* Thorne, 18 N. Y., 285, 292, added:

"But the parties are never precluded from giving evidence to impeach the account, *unless the case is brought within the principles of an estoppel in pais.*"

The nature of an estoppel *in pais* has frequently been discussed in this Court, and its general principles defined. Thus, in Morgan *v.* Railroad Co., 96 U. S., 716, 720, Mr. Justice Swayne, speaking for the Court, said:

"The principle is an important one in the administration of the law. It not unfrequently gives triumph to right and justice where nothing else could save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent. *The Bank of the United States* v. *Lee*, 13 Pet., 107."

See, also, Gregg *v.* Von Phul, 1 Wall., 274, 281.

Under the principle of estoppel, a man may even adopt and ratify a forgery, as he may, of course, do so by express agreement.

Union Bank *v.* Middlebrook, 33 Conn., 95.
Howard *v.* Duncan, 3 Lansing (N. Y.), 174.
Greenfield Bank *v.* Crafts, 4 Allen, 447.
Charles River Nat. Bank *v.* Davis, 100 Mass., 413.
Forsyth *v.* Day, 46 Maine, 177.
Continental Nat. Bank *v.* Nat. Bank of the Commonwealth, 50 N. Y., 575.

POINT VI.

Cooper did not personally examine the pass-book and returned checks. He devolved that duty upon his agent, Berlin, and he must consequently be presumed to have knowledge of every fact which an examination of the pass-book and vouchers would have disclosed. This is unquestionably so, within the maxim, almost of universal application. *Qui facit per alium facit per se.*

Since *Fitzherbert* v. *Mather*, 1 T. R., 15, it has been an undoubted rule of law, that notice to an agent is notice to his principal. "On general principles of policy," says Ashhurst, *J.*, in that case, "the act of the agent ought to bind the principal, because it must be taken for granted that the *principal knows whatever the agent knows.*"

Had this duty of examination been devolved on any other agent than Berlin, no doubt could arise that Cooper would be affected and chargeable with all the knowledge of such agent, and, therefore, bound by all the consequences of such knowledge, as much so as if he had actual knowledge.

Cooper is in law affected by the knowledge of his agent, Berlin, to the same extent as if the examination had been deputed to any other agent innocent of any knowledge as to the original forgery.

The leading case on constructive notice is *Kennedy* v. *Green*, 3 Mylne & K., 699. It is exactly in point to sustain the proposition in the case at bar, that although in the examination of the pass-book and vouchers Mr. Cooper would not be bound by the knowledge of Berlin as to the committing of his forgeries, *he is, nevertheless, affected with knowledge of such forgeries and the*

discrepancies in the accounts if such examination would disclose them.

Kennedy v. *Green* has never been overruled, *and, on the point on which it was decided and on which we cite it here,* it has never even been questioned, either in England or in the United States so far as we can ascertain after a somewhat exhaustive research. A perusal of the case will show how thoroughly the subject was considered by Lord Brougham, *L. C.* Briefly stated, the facts were that the plaintiff, Mrs. Kennedy, held a mortgage on certain leaseholds. One Bostock was her solicitor. He fraudulently procured her to satisfy her mortgage, and was thus enabled to obtain from the defendant, Kirby, whom he also represented as solicitor, some £2,000 on mortgage of such leaseholds. Both Mrs. Kennedy and Kirby were innocent, and equally the dupes of the dishonest lawyer. It was, first, sought to charge Mr. Kirby with the knowledge of the commission of the fraud, because Bostock, the solicitor, of course, knew of it and, secondly, urged that Mr. Kirby was so bound because an examination of the deed would have put any solicitor upon inquiry. Lord Brougham held on the first ground that Mr. Kirby was not chargeable; but on the second ground held him to be affected with notice. The reasoning is so pertinent that we quote at length from the opinion, at pages 720 *et seq.*:

"Bostock was acting as Mr. Kirby's solicitor in the transaction, and although, generally speaking, the knowledge obtained by a man's attorney or agent fixes himself, if obtained while so employed and on the same business, . . . yet it cannot here be said that Mr. Kirby is fixed with all which Bostock knew. For the fraud, practiced by Bostock upon Mr. Kirby himself, was of course concealed from him; and so we may say would certainly be that other fraud which he had practiced on Mrs. Kennedy. Indeed, that was only another part of the same fraud, another act of the same plot. . . . . We must lay out of our view all the knowledge, the actual and full knowledge he had of his own fraud, and are not to hold Mr. Kirby as cognizant—I mean, of course, con-

nizant in law and constructively—of that, merely because his solicitor, himself the contriver, the actor and the gainer of the transaction, knew it all well.

"But, suppose him not the actor, and only regard him as an attorney wholly unconcerned in the plot, and employed by Mr. Kirby, and not only innocent of the whole affair, but wholly ignorant of it." [As here, in the case at bar, suppose Berlin to have been innocent and the forgeries to have been committed by some other person.] "This supposition is as strong as we can make in Mr. Kirby's favor, gets rid of all the last argument I have adverted to, and meets the objection that the plotter of the fraud never could communicate it to one of its victims; and that to charge the latter with his guilty knowledge would be unjust. I say still, with all this deduction and all this supposition, Mr. Kirby is fixed. For Bostock had he been wholly free from the guilty knowledge, and only employed as a solicitor to act for and advise Mr. Kirby, must, on seeing the deed, have had his attention at once called to the suspicious circumstances under which it was executed. * * * * Assuredly no one can hesitate in pronouncing that whoever, especially a man of business, looked at the deed, must have conceived such suspicions as to call for inquiry; and if he had inquired, Mrs. Kennedy would have told him that she knew of no receipt, and had received no money, and that the whole, consequently, was a fraud. Thus, taking Bostock to be merely an ordinary solicitor, employed by Mr Kirby in settling this transaction for him, the deed was such as at once gave him notice that all was not right, and put him upon inquiring. That is notice to him and his employer of whatever the inquiry would have disclosed. Can it make the least difference, that in this case Bostock abstained from making the inquiry, because he already knew the whole fraud, the tissue of which his own hands

And this doctrine was reaffirmed, almost in the very language of Lord Brougham, by the Supreme Court of Massachusetts, in *Dana* vs. *National Bank of the Republic*, 132 *Mass.*, 156, 160, as follows:

"If the examinations made by Piper as agent for the plaintiffs, and the information which came to him within the scope of his agency, were sufficient to have given him notice of the forgery of the check of November 20, it does not lie in the mouth of the plaintiffs to say that he did not acquire that knowledge as their agent, so as to affect them with it. *If such examinations would have given them notice if made by an honest agent, they cannot affect ignorance because they were made by a dishonest agent, who had fraudulent knowledge of the fact.*"

discrepancies in the accounts if such examination would disclose them.

Kennedy v. *Green* has never been overruled, *and, on the point on which it was decided and on which we cite it here*, it has never even been questioned, either in England or in the United States so far as we can ascertain after a somewhat exhaustive research A perusal of the case will show how thoroughly the subject was considered by Lord Brougham, *L. C.* Briefly stated, the facts were that the plaintiff, Mrs. Kennedy, held a mortgage on certain leaseholds. One Bostock was her solicitor. He fraudulently procured her to satisfy her mortgage, and was thus enabled to obtain from the defendant, Kirby, whom he also represented as solicitor, some £2,000 on mortgage of such leaseholds. Both Mrs. Kennedy and Kirby were innocent, and equally the dupes of the dishonest lawyer. It was, first, sought to charge Mr. Kirby with the knowledge of the commission of the fraud, because Bostock, the solicitor, of course, knew of it and, secondly, urged that Mr. Kirby was so bound because an examination of the deed would have put any solicitor upon inquiry [illegible] on the first ground [illegible] on the

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"But, suppose him not the actor, and only regard him as an attorney wholly unconcerned in the plot, and employed by Mr. Kirby, and not only innocent of the whole affair, but wholly ignorant of it." [As here, in the case at bar, suppose Berlin to have been innocent and the forgeries to have been committed by some other person.] "This supposition is as strong as we can make in Mr. Kirby's favor, gets rid of all the last argument I have adverted to, and meets the objection that the plotter of the fraud never could communicate it to one of its victims; and that to charge the latter with his guilty knowledge would be unjust. I say still, with all this deduction and all this supposition, Mr. Kirby is fixed. For Bostock had he been wholly free from the guilty knowledge, and only employed as a solicitor to act for and advise Mr. Kirby, must, on seeing the deed, have had his attention at once called to the suspicious circumstances under which it was executed. * * * * Assuredly no one can hesitate in pronouncing that whoever, especially a man of business, looked at the deed, must have conceived such suspicions as to call for inquiry; and if he had inquired, Mrs. Kennedy would have told him that she knew of no receipt, and had received no money, and that the whole, consequently, was a fraud. Thus, taking Bostock to be merely an ordinary solicitor, employed by Mr Kirby in settling this transaction for him, the deed was such as at once gave him notice that all was not right, and put him upon inquiring. That is notice to him and his employer of whatever the inquiry would have disclosed. Can it make the least difference, that in this case Bostock abstained from making the inquiry, because he already knew the whole fraud, the tissue of which his own hands had woven? Can it alter the fact, or displace the point, on which the whole turns, of the existence of suspicious appearances, and the certainty that the inquiry, instigated by them, must have disclosed the truth, that this truth was already within the full knowledge of the person employed, and whom we are supposing to have examined the deed for his client? A difference it may make, but the difference is against, and not in favor, of the defendant's argument.

"Can it, again, make any difference in the case we are supposing of a solicitor employed to examine a deed, and having ground to suspect, and, suspecting, beside being bound to inquire as to its fraudulent concoction, that here, being so employed, he was himself the fabricator of the whole fraud, and only did not suspect, because he knew forc ertain the whole plot? A difference it may make, but that difference is against, and not in favor of the defendant's argument."

To affect the principal with the knowledge so to be obtained is but simple justice to the equally innocent third party; and to do so would be far more likely to promote good faith and fair

dealing than any rule which would visit on the innocent third person, who rested under absolutely no responsibility for the agent's employment, the consequences of the acts of a dishonest agent.

In an article by the author of Wade on the Law of Notice published in the January–February, 1885, number of the *American Law Review*, Vol. XIX., p. 83, the following terse language was used:

"The rule rests upon a firmer and more rational basis. The principal declining to rely upon his own faculties, employs those of an agent, who become *his* ear; *his* eye; *his* brain; *his* hand, *himself*, to all intents and purposes connected with the subject of the employment. If the ear, the eye, or the hand prove treacherous to its master, there is no good reason why the consequent disasters should be foisted upon the shoulders of an innocent stranger, who never confided in the unwisely chosen instrument."

And this is abundantly supported by familiar authorities.

Thus, in Verona Central Cheese Co. *v.* Murtaugh, 50 N. Y. 314, 316, the Court of Appeals said:

"This knowledge of the agent is imputed to the principal, and held as constructive notice to him upon general principles of public policy. It is presumed that the agent has communicated the facts within his knowledge to his principal, and if he has not, that nevertheless, the latter having entrusted the agent in a particular business, it is more reasonable that, where one party must suffer by the misconduct of another, he should sustain the loss who has reposed the confidence in the agent, rather than the third person who has given no such confidence. . . . . The liability is as absolute as if the acts had been performed by the principal in person, or the knowledge of the particular facts had been actually communicated to him."

See also, on the general rule as to the effect of knowledge by the agent,

Dresser v. *Norwood*, 17 C. B., N. S., 466.
Bennett v. *Buchan*, 76 N. Y., 386.
Hoover v. *Wise*, 91 U. S., 308, at p. 310.
Smith v. *Ayer*, 101 U. S., 320, at p. 326.

Further. If the essential question in this case turns around the examination of the pass-book and vouchers, and it be held that Mr. Cooper is affected with all that the examination would have disclosed, it is singularly fit and proper, as between himself and the bank, that these losses should be borne by Mr. Cooper. His trust and confidence in Berlin were unbounded; and the rule is axiomatic in the law that where one of two innocent parties must suffer in such a case, he should bear the burden who has reposed the confidence.

In *Hern* v. *Nichols*, 1 Salk., 289, Lord Holt, speaking of the fraud of an agent practiced not on his principal but on a third party, forcibly said:

"Seeing somebody must be a loser by this deceit, it is more reasonable that he that employs and *puts a confidence* in the deceiver, should be a loser, than a stranger."

Lord Hardwicke, in Le Neve *v.* Le Neve, 3 Atk., 646, 655, 1 Vesey, Sr., 64, tersely said:

"But, then, who ought to suffer, the person intrusting an agent, or a stranger who did not employ him? He, certainly, who trusts most ought to suffer most."

Ashurst, *J.*, in *Lickbarrow* v. *Mason*, 2 T. R., 70, stated the rule in these words:

"We may lay it down as a broad, general principle, that, wherever one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it."

These reasonings apply with peculiar force to this case. Cooper deputed to Berlin the performance of what he himself should have done. The Bank did not trust Berlin. It had no knowledge whatever that he examined the pass-book. It looked rightfully to Cooper to at least ratify the supposed validity and genuineness of each of the checks returned as vouchers.

This Court has gone in the application of this principle even farther than is necessary to cover this case. Thus, in *Merchants' Bank* v. *State Bank*, 10 Wall., 604, 645, it was said:

"Estoppel *in pais* presupposes an error or a fault and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences and cast the burden upon another. Smith was the cashier of the State Bank. As such he approached the Merchants' Bank. The bank did not approach him. Upon the faith of his acts and declarations, it parted with its property. The misfortune occurred through him, and as the case appears in the record, upon the plainest principle of justice the loss should fall upon the defendant. The ethics and the law of the case alike require this result.

"Those who created the trust, appointed the trustee and clothed him with the powers that enabled him to mislead, if there were any misleading, ought to suffer rather than the other party."

POINT VII.

When Cooper first ascertained these alterations of his checks, about the 1st or 2d of March, 1881, his clerk had been absent for a day. He thereupon sent his bank-book to the bank to be balanced. On its return with the vouchers, he then notified the bank that his clerk had absconded and that alterations had taken place. Eleven of the thirteen checks had been altered over two months previously and returned to him. The bank was thus lulled into security and may have omitted efforts it would otherwise have made to procure indemnity. Had he at any time informed the bank of these alterations, the bank would not only have declined to honor any checks of Mr. Cooper, the bodies of which were in the handwriting of Berlin, but it would have taken measures to arrest the criminal, as well as to recover the amount paid out by them on such raised checks (Record, fol. 86–87). It was not, however, until his clerk had absconded that he notifies the bank. The damage it sustained

the neglect and delay is self-evident. Indeed, it has been judicially recognized, for, in *Continental National Bank* v. *National Bank of the Commonwealth*, 50 *N. Y.*, 575, 590, Folger, J., said:

"Arrest and detention of the swindler is a powerful means in coercing restoration."

So, too, this Court in *U. S. Bank* v. *Bank of Georgia*, 10 *Wheaton*, 333, 344 (hereinafter referred to at length) has distinctly decided that—

"The law will, therefore, presume a damage actual or potential, sufficient to repel any claim against the holder."

Again, Parker, C. J., in *Gloucester Bank* v. *Salem Bank*, 17 *Mass.*, 33, 45, 46, after saying that a delay of fifteen days was too great, continues:

"The defendants then had no means of looking up those from whom they had received the notes; and, although there is no evidence in the case from which it can be ascertained that they could have saved themselves if they had received earlier notice, the law itself will presume that a change of circumstances had taken place which would justify them in resisting the action."

And in *Redington* v. *Woods*, 45 *Cal.*, 406, 426, a case of altered checks, the subject was critically considered at considerable length, and the rule laid down in the above cases strictly enforced. The Court there said:

"The reason assigned for the strictness of the rule is, that delay in returning the notes would render it more difficult to trace out the person from whom the prior holder had received them, and to obtain restitution of the consideration paid for them. As between two innocent persons, neither should be allowed to impair or jeopardize the rights of the other by any negligence whatever, and he who commits the negligence should suffer the loss. * * * But in each case the person from whom the spurious paper was received is entitled to the fullest opportunity to obtain indemnity, if he can, from the prior indorsers or guarantors, if there be any; and if there be none, then from the person to whom he paid the consideration. * * * But if there were no prior endorsers, his remedy against the person from whom he received the forged check or bill is plain. If the defendants in this case had refunded the

money on being notified of the forgery, or on the subsequent demand of pa
ment, their right to proceed against the stranger from whom they received t
check would have been unquestionable; and it is clear that they could n
effectively have prosecuted civil proceedings against him without the poss
sion of the check. * * * *I am, therefore, of opinion that a failure,*
return, or to offer to return, the check to the defendants is a valid defense to t
action; and on this ground the judgment must be reversed, and the cause remande
for a new trial."

If it be argued that Berlin destroyed the checks, ar
that consequently Mr. Cooper could not return them, the su
ficient answer must be that the latter entrusted the custody o
the checks to Berlin. The Bank certainly did not.

That a party's position will be presumed to be substantiall
altered by delay has been often adjudicated.

As in Price *v.* Neale, 3 Burrow's, 1354, which arose
1762, concerning a forged bill of exchange, Lord Mansfie
quaintly remarks, that it is too late for the plaintiff to seek
mend matters after he had "lain by till the forger had come
be hanged."

In Casco Bank *v.* Keene, 53 Maine, 103, arrest is named
one of the means of obtaining security which the plaintiff had
slip.

In Knights *v.* Wiffen, L. R., 5 Q. B., 660, Blackburn, *J.*, go
so far as to say that it needs not, that it should appear that a
benefit would result from the attempt to secure payment, bu
that the injured party had the right to make that attempt.

In Hopkins *v.* Ware, 38 L. J. [N. S.] Ex., 147, 149, durin
the delay—the interval between the 11th of May and the 4th
June—the forger had absconded. Channell, B., as to effect
this said:

"Therefore, I cannot help thinking the defendant's situation was altere
for the worse, and there was what was called laches on the part of the plainti
that is to say, by holding over the check for an unreasonable time she h

ered the defendant's position for the worse; and by that act she has made check her own property, and the defendant is entitled to treat the giving of s an actual payment."

POINT VIII.

It may be suggested on this point that as Cooper had no tual knowledge of the frauds, his silence could not estop him m asserting the truth as soon as he ascertained it. This is o narrow a view to take of the principle of an estoppel *in is.*

The rule is not confined to facts actually known, but includes hat a person *ought* to have known, as here Cooper ought to ave known the large discrepancies in his check-book, his pass-ook, and the checks returned. Cooper may have been per-ectly innocent of any intent to mislead, by failing to examine nd verify his accounts. Yet his conduct did work injury to the ank, and his failure to perform the duty of examination which e reasonably owed to the bank was the proximate cause of its ontinued losses.

A similar suggestion, that intent to mislead was necessary, as discussed in the case of the Continental National Bank *v.* National Bank of the Commonwealth, 50 N. Y., 583, where olger, *J.*, said:

"And we hold that there need not be, upon the part of the person making declaration or doing an act, an intention to mislead the one who is induced to ely upon it. There are cases in which parties have been estopped where their cts or declarations have been done or made in ignorance of their own rights, ot knowing that the law of the land gave them such rights. Here, certainly, here could be no purpose to mislead others, for there was not the knowledge o inform the purpose, and both parties were equally and innocently misled. ndeed, it would limit the rule much within the reason of it, if it were restricted o cases where there was an element of fraudulent purpose. In very many of he cases in which the rule has been applied there was no more than negli-

gence on the part of him who was estopped. And it has long been held where it is a breach of good faith to allow the truth to be shown, the admission will estop."

And after examining some authorities, and referring, am them, to *Howard* v. *Hudson*, 2 *Ellis & Bl.*, 1, in which L CAMPBELL, C. J., recognizes the existence of the principle t doing an act and omission to act are the same, MR. JUST FOLGER continued (pp. 585–586):

"These cases appear to us to lay down a sound rule. It must be tha conduct of men, which may be influenced by the declarations of those whom they deal, is not confined to that which is shown by affirmative positive acts following upon and induced by those declarations. Conde not alone that which is active, positive and affirmative. Conduct, as limite this inquiry, is the reserve of one's own powers of person and property, an those means of help which can be summoned from friendly or accommodat sources and from the tribunals and officers of justice, and is as often forbe ance of their use and quiescence and contentment with affairs as they are action designed to change affairs. And such quiescence and content, indu by false or erroneous statement, may be quite as damaging as any result fr action. It is as bad to fail to recover property gone, when with the knowled of an existing fact it might have been retrieved, as it is to lose it. And so it as damaging to rely in quiet upon an untrue statement, to the neglect of usi the means of recovery, as it is to rely upon an untrue statement, to the neglect of usi thereon meet with loss irreparable. To hold otherwise would be to assert th the law makes a difference between damage received by action and omisst act, in circumstances precisely similar save in these elements. When a produces conduct from which flows injury, it cannot matter whether that c duct be affirmative or negative, active or quiescent."

POINT IX.

Although the present case has not been in terms decid by this Court, the principles involved were early enunciat in U. S. Bank v. Bank of Georgia, 10 Wheaton, 333 *et seq.*, M Justice Story writing the opinion of the Court. The reasonin of that case has been repeatedly approved and confirmed.

The nature of the action and the material facts are stated in the opinion from which we quote the following:

"This is a case of great importance in a practical view, and has been very ably argued upon its merits. The Bank of Georgia having originally issued the bank notes in question, they were, in the course of circulation, fraudulently altered, and having found their way into the Bank of the United States, the latter presented them to the former, who received them as genuine and placed them to the general account of the Bank of the United States as cash, by way of general deposit. The forgery was not discovered until nineteen days afterwards, upon which notice was duly given and a tender of the notes was made to the Bank of the United States and by them refused. Both parties are equally innocent of the fraud, and it is not disputed that the Bank of the United States were holders, *bona fide*, for a valuable consideration. Under these circumstances the question arises, which of the parties is to bear the loss, or, in other words, whether the plaintiffs are entitled to recover in this action the amount of this deposit. * * * The notes in question were not the notes of another bank, or the security of a third person, but they were received and adopted by the bank as its own genuine notes, in the most absolute and unconditional manner. They were treated as cash and carried to the credit of the plaintiff in the same manner and with the same general intent as if they had been genuine notes or coin. * * *

"Under such circumstances the receipt by a bank of forged notes purporting to be its own, must be deemed an adoption of them. It has the means of knowing if they are genuine; if these means are not employed, it is certainly evidence of a neglect of that duty, which the public have a right to require. And in respect to persons equally innocent, where one is bound to know and act upon his knowledge and the other has no means of knowledge, there seems to be no reason for burthening the latter with any loss in exoneration of the former. There is nothing unconscientious in retaining the sum received from the bank in payment of such notes, which its own acts have deliberately assumed to be genuine. If this doctrine be applicable to ordinary cases, it must apply with greater strength to cases where the forgery has not been detected until after a considerable lapse of time. The holder, under such circumstances, may not be able to ascertain from whom he received them, or the situation of the other parties may be essentially changed. Proof of actual damage may not always be within his reach; and therefore to confine the remedy to cases of that sort would fall far short of the actual grievance. The law will, therefore, presume a damage, actual or potential, sufficient to repel any claim against the holder. Even in relation to forged bills of third persons received in payment of a debt, there has been a qualification engrafted on the general doctrine that the notice and return must be within a reasonable time; and any neglect will absolve the payer from responsibility.

"If, indeed, we were to apply the doctrine of negligence to the present case, there are circumstances strong to show a want of due diligence and circumspection on the part of the Bank of Georgia. It appears from the statement of facts that all the genuine notes of that bank of the denomination of 100 dollars, in circulation at this time, were marked with the letter A, whereas twenty-three of the forged notes of 100 dollars bore the marks of the letter B, C, D. These facts were known to the defendants, but unknown to the plaintiffs; so that by ordinary circumspection the fraud might have been detected."

Mr. Justice STORY then considers at length (see pp. 348, 351, 352), a number of authorities as to cases of forged bills of exchange, showing how strictly and stringently the Courts in England and here have visited any loss resulting from negligence or delay on the party in fault, citing, among others, Price *v.* Neale (3 Burrow's Rep., 1355), Smith *v.* Mercer (6 Taunt., 76), and Gloucester Bank *v.* The Salem Bank (17 Mass., 33), to which particular attention is asked.

This extensive quotation from Mr. Justice Story's opinion has been made because its underlying principles, which have never been questioned in this Court, seem to govern the present case. Its analogies are striking. The filling up was in the same handwriting as that of all genuine checks. Mr. Cooper thus, by his custom to have Berlin fill in his checks, gave to checks so filled up the stamp of genuineness. Cooper alone, therefore, could in all reasonable probability detect the alteration. By his conduct he adopted the forged checks in the most absolute manner. The depositor is, of course, bound to know his own checks. He knew of their return ; he knew the Bank returned them as its vouchers. Without examination he blindly acquiesces in their validity—consequently adopts them. He certainly had the means of knowing if they were genuine. If he does not employ those means, so simple and easy, is it not *evidence* of neglect of that duty, which, as a business man, he owed to the bank ? His duty was to examine them as soon as he had an opportunity and

return them immediately if forged. By ordinary circumspection the frauds might have been detected. His neglect led to future frauds; his conduct thus encouraged, facilitated and gave occasion to further forgeries. No argument is necessary to demonstrate that this case is exactly in point, as also is the case of the Gloucester Bank *v.* Salem Bank, 17 Mass., 33, to which, as will be observed, it refers at length.

So, too, Dana *v.* National Bank of the Republic, 132 Mass., 156, is squarely in point. It involved the alteration of the body of a check as well as the effect of balancing the pass-book. The Court there used the following language, equally applicable to the case at bar:

"Whether the rule given to the jury properly applies to a mistake in the statement of an account only, which is for the advantage of the party making it, and by which his condition is not changed, it is not necessary to consider. When the error in an account is not a mere mistake in statement, but is the statement of a mistake of fact—of some act of a party which is not for his advantage, and by which his condition is changed—a different rule will apply. The instructions do not refer to any negligence of the defendant. They assume the case of a check signed by the plaintiffs and apparently genuine, taken in good faith by mistake. The mistake was in the payment of the money upon an altered check, believed to be genuine; it was not for the advantage of the defendant, and its condition was changed by it. It was in the course of dealings between the parties, in relation to which each owed duties to the other. The facts concerning the monthly statements are facts in the dealings between the parties in relation to the check and the payment, which the defendant offers as evidence upon the question whether the plaintiffs have so failed in their duty to the defendant, as to be deemed to have adopted the check and ratified the payment of it.

"The plaintiffs owed to the defendant the duty of exercising due diligence to give it information that the payment was unauthorized; and this included not only due diligence in giving notice after knowledge of the forgery, but also due diligence in discovering it. If the plaintiffs knew of the mistake, or if they had that notice of it which consists in the knowledge of facts which, by the exercise of due care and diligence, will disclose it, they failed in their duty; and adoption of the check and ratification of the payment will be implied. They cannot now require the defendant to correct a mistake to its injury, from which it might have protected itself but for the negligence of the plaintiffs.

Whether the plaintiffs were required, in the exercise of due diligence, to read the monthly statements, or to examine the checks, and how careful an examination they were bound to make, and what inferences are to be drawn, depend upon the nature and course of dealing between the parties, and the particular circumstances under which the statements and checks were delivered to them. The facts that the statements and checks for November and December were submitted to the plaintiffs, and that they closed the account in January following, according to those statements, are to be taken in connection with other evidence in the case. There was evidence that the plaintiffs did examine the statements and checks, so far as to see that the checks returned corresponded with the amounts in the stub of the check-book. Whether this was all the examination required, we need not consider. The plaintiffs made that examination, and are affected with the knowledge it would give, though it was made by Piper. He was their agent for that purpose. The check in question was dated November 20, and was drawn to the order of the Revere Sugar Refinery, to pay a bill due to the payee, payable either November 20 or December 10, at the option of the plaintiffs, who rarely allowed such bills to run over ten days. On December 10, a duplicate of the same bill was presented to the plaintiffs, and paid by a check on another bank. Whatever inference as to knowledge of this double payment, and the misuse of the check of November 20, may be drawn from the knowledge the plaintiffs may have had of their own accounts with the Revere Sugar Refinery, and from the examination of the check-book, is not to be affected by the fact that the examination was made by Piper.* * *

"The evidence offered by the defendant would show that the plaintiffs received the monthly statements in December and January, and closed their account in January, with such knowledge as would be inferred from the facts proved. Whether that was notice of the forgery, or would have called for further examination, and led to the discovery of it, was a proper question for the jury. This evidence should have been admitted and submitted to the jury upon the question whether the mistake would have been discovered but for the negligence of the plaintiffs, or their agents, or the fraudulent conduct of Piper in regard to acts within the scope of his agency; and whether the examinations, made by the plaintiffs or their agents, were such as to lead to a discovery of the forgery, and affect the plaintiffs with notice of it."

Again, *American National Bank* v. *Bushey*, 45 Mich., 135, 140, is similarly in point. There the following language was used:

"We are bound to take knowledge of the ordinary rules and necessities of business, and to deal with controversies in view of these. Banks have a right to expect their depositors to know these usages, and to conform to them. And

they have a right to rely to a reasonable extent on the presumption that their customers are thus dealing with them * * *

"When Bushey was notified by the bank that on his account there was a balance in his favor of $50, his attention was necessarily called to the entire account, and it became his duty to examine it. He was not told, and there was no occasion on the part of the bank to tell him, how this balance arose. The bank had a right to assume that he kept accounts himself, and had the means of tracing out the items, and that if he had not full *data* he would resort to the bank to get them. He made no inquiry or objection, and at once acted on the notification, and drew out the admitted balance, and for nearly two years never interfered further. There could not very well be a stronger case of acquiescing in an account stated."

The case of *Redington* v. *Woods*, 45 Cal., 406, 419, *et seq.*, is particularly instructive as it points out clearly the difference and distinction between the duty the bank imperatively owes to know the signature of its depositors and its obligation to exercise as to the body of the check only ordinary care and prudence.

City Bank of Macon v. *Kent*, 57 Ga., 283,303, is also instructive as establishing that the element of ratification and adoption, if shown, will defeat recovery from the bank.

POINT X.

The Court virtually held, in directing a verdict for the plaintiffs below, that as matter of law Mr. Cooper owed no duty whatever to the bank to examine either his pass-book or the checks returned as vouchers.

It further held as matter of law that Mr. Cooper had not been negligent in the conduct of his business relations with bank.

It likewise held that under no aspect of the facts was he estopped.

The exceptions to the Court's rulings are abundantly sustained by the authorities cited and discussed in the foregoing points. Indeed, if the principles of those authorities apply the direction should have been in favor of the bank (*U. S. Bank* v. *Bank of Georgia*, 10 Wheat., 333). At least, the defendant was fairly entitled to have had submitted to the jury the questions of estoppel and negligence involved in the case. It asked to go to the jury in all aspects, but it was absolutely denied that right. For this error alone this Court, even if not sustaining the foregoing views, should reverse the judgment and remand the cause with directions to grant a new trial, as was recently done in *Baylis* v. *Travellers' Insurance Company*, 113 U. S. 316, 320, where Mr. Justice Matthews said:

"Without a waiver of the right of trial by jury, by consent of parties, the Court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue, and renders judgment thereon.

"This is what was done in the present case. It may be that the conclusions of fact reached and stated by the Court are correct, and, when properly ascertained, that they require such a judgment as was rendered. That is a question not before us. The plaintiff in error complains that he was entitled to have the evidence submitted to the jury, and to the benefit of such conclusions of fact as it might justifiably have drawn; a right he demanded and did not waive; and that he has been deprived of it, by the act of the Court, in entering a judgment against him on its own view of the evidence, without the intervention of a jury.

"In this particular we think error has been well assigned. The right of trial by jury in the courts of the United States is expressly secured by the Seventh Article of Amendment to the Constitution, and * * * this Constitutional right this Court has always guarded with jealousy."

Nor is it an answer to say that there was no conflict of evidence. It was enough that the jury might have inferred negligence; might have inferred such facts as would justify an estoppel *in pais*. How frequently has this Court sanctioned the submission to the jury, in insurance cases, for example, of evidence from which the jury might infer *laches*, waiver, acqui-

cence, estoppel. The learned Judge below took upon himself to make whatever inferences and draw whatever conclusions might be made or drawn from the evidence. This the Court could not legally do, for it could not take away from the jury the right of weighing the evidence and determining what effect it should have.

Greenleaf v. *Birth*, 9 *Peters*, 292, 298.

This Court said, in the *United States* v. *Laub*, 12 *Peters*, 1, 5:

"It is a point too well settled to be now drawn in question that the ***effect and sufficiency*** of the evidence are for the consideration and determination of the jury."

This language it reiterated in *The Bank of the Metropolis* v. *Guttschlick*, 14 *Peters*, 19, 31:

"It is the province of the jury to decide what facts are proven. It is competent to them to draw from the evidence before them all such inferences and conclusions as that evidence conduces to prove. If the Court were to tell them that upon a given state of evidence the plaintiff could or could not recover, then they must, on the assumption of what facts were proven, either discard from their consideration such inferences as the jury might draw, or they must themselves deduce them. The first course would injure the party offering the evidence; the second would be an usurpation of the office of the jury."

Again: in *Phoenix Ins. Co.* v. *Doster*, 106 *U. S.*, 30, 32, Mr. Justice HARLAND said:

"Where a cause fairly depends upon the effect or weight of testimony, it is for the consideration and determination of the jury, under proper directions as to the principles of law involved. It should never be withdrawn from them, unless the testimony be of such a conclusive character as to compel the Court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it."

The fairness and propriety of such a rule is well stated in *Railroad Company* v. *Stout*, 17 *Wall.*, 657, 663, as follows:

"Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence.

It is this class of cases, and those akin to it, that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

The questions involved in the present case should, therefore, have been submitted to the jury with proper instructions as to the law. Thus, it has been repeatedly held, under exactly the same circumstances, that it is a fair question for the jury to determine whether a loss might not have been averted by the exercise of ordinary care by seasonable notice of a forgery. It was so held in *Hardy* v. *Chesapeake Bank*, *supra* (51 Md. 562, 593), a case on all fours with the present one:

"But, without going over all the circumstances of the case, we think the whole evidence ought to be submitted to the jury to be weighed by them. It is not for this Court to say whether the evidence bearing upon the question of estoppel be weak or strong; we are only called upon to say whether there is any evidence *legally* sufficient to be submitted to the jury for their consideration, and in this case we think the evidence should go to the jury."

Such also was the distinct point decided in *Dana* v. *National Bank of the Republic*, *supra* (132 Mass., 158):

"We think that the evidence in respect to the monthly statements, and other evidence bearing upon them, should have been submitted to the jury upon the question of implied ratification of the payment to Piper."

And nearly all the cases cited in the foregoing points recognize the rule that in such a case it is peculiarly the province of the jury to pass upon the facts and such inferences as may be drawn therefrom.

POINT XI.

Three cases in the New York Court of Appeals were relied on by the plaintiffs below as entitling them to the direction to the jury to find a verdict in their favor. We may anticipate their citation in this Court. They are:

Weisser v. *Denison*, 10 N. Y., 68.
Welsh v. *German American Bank*, 73 N. Y., 424.
Frank v. *Chemical Nat. Bank*, 84 N. Y., 209.

In the two first cases it was apparently held that the depositor owed *no* duty to examine his pass-book and vouchers, but the last case—Frank *v.* Chemical Nat. Bank, decided in 1881—does recognize that there is *some duty* in that regard; ANDREWS, *J.*, saying in that connection:

"It does not seem to be unreasonable, in view of the course of business and the custom of banks, to surrender its vouchers on the periodical writing up of the accounts of depositors, to exact from the latter some attention to the account when it is made up, or to hold that the negligent omission of all examination may, when injury has resulted to the bank, which it would not have suffered if such examination had been made, and the bank had received timely notice of objections, preclude the depositor from afterwards questioning its correctness."

These decisions, whatever their purport may be, are not binding on this Court, for

a. They are upon doctrines of commercial law and general jurisprudence, as to which it is both the right and duty of this Court, within well-settled principles, to exercise its own judgment.

b. They are opposed to the principles enunciated by this Court in *U. S. Bank* vs. *Bank of Georgia*, 10 *Wheat.*, 333, and by the Supreme Court of Massachusetts in *Gloucester Bank* vs. *Salem Bank*, 17 *Mass.*, 33.

c. They are opposed to the better considered cases, directly in point, of

Dana vs. *Nat. Bank of the Republic*, 132 *Mass.*, 158.
Hardy vs. *Chesapeake Bank*, 51 *Maryland*, 562, 591.
American Nat. Bank vs. *Bushey*, 45 *Mich.*, 140.

POINT XII.

If the foregoing views be well founded, and the principles referred to govern this case, then the first to the thirteenth errors, inclusive, are well assigned.

POINT XIII.

As to the Second Cause of Action.

The account with the bank was kept in the name of "W. B. Cooper, Jr., agent for Ashburner & Co."

The check for $280.97 (on which is based the second cause of action in the complaint set forth) was drawn by "W. B. Cooper, Jr., agent for Ashburner & Co." to the order of "W. B. Cooper, Jr., agent," that is a check not drawn to the order of the drawer (W. B. Cooper, Jr., agent for Ashburner & Co.), but to that of another person (W. B. Cooper, Jr., agent).

The endorsement of the check returned in the bill of exceptions is not correctly printed in the record (Record, fol. 82), and by consent of counsel, a photographic copy of the check and endorsements are annexed to this brief. From its inspection it is apparent

1. That it does bear the endorsement in blank of the payee, viz.: "W. B. Cooper, Jr., agent."

2. That it does not bear a completed, but only an imperfect special endorsement for deposit to the credit of the drawer, and hence of no legal effect or significance—that is to say, the endorsement reads:

For deposit in
LEATHER MANFS.' NAT. BANK
to the credit of

Agt. for Ashburner & Co.

To make such check payable by the bank required the endorsement of the payee "W. B. Cooper, Jr., Agent." If it were endorsed in blank by the payee, such check became payable to bearer. So that, when endorsed by the payee in blank to make it solely depositable to the credit of the drawer himself would require a further special endorsement for deposit. The bank paid it to bearer because it bore the endorsement of the payee. It is, however, claimed, that it also had a special endorsement for deposit. A sufficient answer should be that the stamp "for deposit" was not filled in, and that, therefore, the endorsement was incomplete. Certainly the endorsement in writing of "W. B. Cooper, Jr., Agent," could not serve two purposes: one as the endorsement of the payee, presumably not the drawer, but Mr. Cooper individually; the other, as to the filling in of the "for deposit" stamp.

Bearing only the one endorsement, the bank justly disregarded the incompleted special endorsement "for deposit," treated it as a blank endorsement, and paid the check to bearer. If the bank did properly so honor the check, it would follow that the fourteenth and fifteenth assignments of error are well made.

CONCLUSION.

The judgment below should, therefore, be reversed, and the cause remanded, with directions to grant a new trial.

October Term, 1885.

CHARLES M. DA COSTA,
NOEL B. SANBORN,
For Plaintiff in Error.

NEW YORK,



LEATHER MANUFACTURERS' NATIO

Pay to the order of

GOLD

Agent for

WM. B. COOPER JUN.R Agent.


ATIONAL BANK
DOLLARS
for ACHBURNER & CO.

117-96

FILED.
NOV 2 1885
JAMES H. MCKENNEY.

Supreme Court of the United States.

IN ERROR TO THE

CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE LEATHER MANUFACTURERS' NATIONAL BANK,

(*Deft.*) *Plaintiff in Error,*

vs.

EDMOND CHARLES MORGAN et al.,

(*Plffs.*) *Defendants in Error.*

Brief for Defendants in Error.

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Supreme Court of the United States.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

OCTOBER TERM, 1885.

THE LEATHER MANUFACTURERS' NATIONAL BANK,
Plaintiff in Error,

vs.

EDMOND CHARLES MORGAN, WILLIAM THOMAS BERNERS and THOMAS PERCY FOX,
Defendants in Error.

No. 45.
Brief for Defendant in Error.

STATEMENT.

The defendants in error, under their firm name of Ashburner & Co., were depositors with the plaintiff in error, a national bank. The action was brought to recover a balance of moneys deposited, and also for the recovery of the amount of a check deposited to the credit of the defendants in error, but not so credited.

There was no dispute as to the amount of the recovery, or as to the demand for the same before action was brought, except that the bank claimed to charge against the deposi-

tor's account, certain checks that had been raised and altered at such raised and altered amounts; and as to the second cause of action, the bank claimed that the endorsement justified their paying the same over their counter to the clerk presenting it. The recovery was had for the difference between the amounts at which the checks were drawn and signed, and the amounts to which they were raised or altered. The statement of the case in the brief for plaintiff in error gives the details of these alterations.

It appears that such alterations were made by a clerk in the employment of the depositors, and that he, in each instance, collected the total amounts from the bank, applied the amounts for which the checks had been originally drawn to the purposes for which they were drawn, and appropriated the balance to his own use in the payment of gambling debts.

The proof consisted of the evidence of the clerk who had committed the forgeries, and that of Mr. William B. Cooper, Jr., the agent of the plaintiffs in this country.

For all the purposes of this case, Mr. Cooper will be treated as the general agent of defendants in error, and as the principal and depositor.

The clerk who commited the forgeries was named Berlin; Cooper had known him since he was twelve years old; knew his family, and had every confidence in him (folio 70).

He acted as confidential clerk, having entire management of the office, keeping all the books, including the check-book, having charge of the bank account, filling up the body of all checks but not signing them (folio 52). Cooper always signed the checks (folio 72), and he gives the details as to his signature on each check, and the use for which the money was intended.

Berlin, to facilitate his forgeries and to hide the matter, forced the footings of the stub of the check-book, by making false additions equal to the increase of the checks as altered (folio 57); and also kept his cash-book incorrectly, to make it agree with his forgeries (folio 61).

The first two forgeries or alterations were committed in the month of September, 1880. On October 7, the depositers' account was balanced and the two raised checks were returned as vouchers, which checks Berlin destroyed and showed only the rest of the vouchers to Mr. Cooper.

One of the duties that he performed in the office was to balance the check-book with the deposit book and vouchers whenever the account was balanced.

The account was again balanced on the 20th of November, when two more of the raised checks were returned, which were likewise destroyed by Berlin.

The account was again balanced on the 18th of January, 1881, when seven more of the raised checks were returned and destroyed by Berlin.

The depositer did not discover the alterations in his checks until the 1st or 2d day of March, 1881, at which time Berlin stayed away from the office for a day, and the witness, on comparing his pass-book with the stubs of his check-book, discovered that a certain number of checks appearing on such stubs were not charged against him in his pass-book, while others, which appeared by his pass-book to have been charged, did not by the stub of the check-book appear to have been drawn.

Thereupon he sent his bank book to be balanced, and it was returned with the last two of the raised checks, which was the first knowledge he had of the forgeries, and he at once notified the bank that his clerk had absconded, and that alterations had taken place, and requested them not to pay any more of his checks the bodies of which were filled up in the handwriting of Berlin, and thereafter he made a claim on the bank accompanied by a detailed statement, at the same time offering to return the two aforesaid checks which were still in existence.

The evidence further showed the care that Berlin took to hide these matters from Mr. Cooper, and the care with which Mr. Cooper in all cases drew his checks, always drawing a line after the payee's name, filling in such line when the line appeared to be faint, and after both the

words and figures filling in a double cross and lines (folio 77).

Some of the alterations were made merely by raising the amounts, others by writing in the word bearer after the payee's name, and in one case by inserting the name of a different payee.

The alterations were badly made and could have been easily discerned by the slightest examination of the checks, in proof of which we submit to the Court the two original checks still in existence.

No question arose as to the facts, and the only evidence offered by the defendant was to the effect that the officers at the bank knew Berlin as the clerk of the depositor; that they examined all checks to see if there were any alterations; and that, if they had discovered any, they would not have made payments; and yet, that they never observed anything suspicious in any of the checks; and then claimed that the alterations were more easily discernible in the checks as presented at the trial, than immediately after the alterations had been made. And further evidence was introduced by the president of the bank, that, if he had known of these forgeries at an earlier period, he would have taken measures to arrest the criminal as well as to recover the amount paid on the checks.

The facts as to the check which constitute the second cause of action, not appearing by an inspection of the same, were as follows: The check was delivered to Berlin with a number of other checks, all endorsed for deposit to the credit of W. B. Cooper, Jr., agent for Ashburner & Co., for the purpose of depositing the same. The total amount of such checks was $3,590.31. The deposit for which the bank gave credit was only $3,309.34, the difference being exactly the amount of such check which was paid over the counter to Berlin, who appropriated the amount, and the depositors never received the money or the benefit thereof. The Court directed a verdict in favor of the depositors on both causes of action, amounting, with interest, to $10,741.09, being the increased amount of the several raised checks, and the check wrongfully paid, with a small admitted balance in the hands of the bank.

FIRST POINT.

A bank paying a forged or altered check is liable to the depositor therefor for the full amount, if forged, and to the raised amount, if altered.

The balancing of the depositor's account, and the rendition of the vouchers, including the altered ones, only make an account stated. The depositor is not bound personally to examine the same. If the examination be confided to a clerk, it is sufficient. If this clerk uses his position to perpetrate forgery, the loss is still on the bank.

Weisser *vs.* Denison, 10 N. Y., 68.
Welsh *vs.* The German American Bank, 73 N. Y., 424.
Frank *vs.* Chemical Bank, 84 N. Y., 209.
Manufacturers' National Bank *vs.* Barnes, 65 Illinois, 69.
Morse on Banks and Banking, page 358.
National Bank *vs.* Tappan, 6 Kansas, 456.

These authorities are directly in point. They are decisive of this action as to the raised checks, and it was, upon the faith of them, that the Court below directed in favor of the plaintiff.

In Weisser *vs.* Denison the clerk of the plaintiff's intestate forged certain checks between February, 1848, and August, 1849, which the bank paid him. During that period the depositor's bank-book had been written up and balanced several times, and the amounts of the forged checks debited upon the books, and the vouchers returned to him. The forger was the depositor's confidential clerk, receiving from the bank in every instance, with a single exception, the bank-book, when balanced, and the cancelled

vouchers, and on his return, comparing the checks returned with the check-book of the intestate, and reporting to his principal that all was right. He abstracted the forged checks from the vouchers returned, and, after his flight, the checks, which were in controversy, were found in his trunk with the bank mark upon them.

The only question submitted to the jury was whether the fifty-one checks, alleged to have been forged, were in fact forged, or not drawn by the authority of the intestate, and the jury were charged, if they found those facts in plaintiff's favor, to give a verdict for the plaintiff.

The opinion of the Court of Appeals of the State of New York on the appeal from that judgment was written by Judge Allen. He takes up, point by point, all the defenses alleged by the plaintiff in error here, holding, first, that the writing up of the bank-book and debiting in it the forged checks and returning the book with the vouchers was a statement of account by the bank, and that the same became an account stated, the only effect of which was to cast the burden of proof upon the depositor to show fraud, error or mistake in the account.

Next disposed of, is the claim that the clerk, in settling the account, was the agent of Weisser, and having knowledge of the forgeries that the principal was affected by this knowledge. That point is overruled, as also the claim of estoppel.

It appeared in that case that the Court at General Term directed a reversal, unless the plaintiff should modify his judgment by deducting his claim for all the alterations after the first balancing of the account, which the plaintiff did, and on that point Judge Allen said:

"I see no reason why the judgment of the Supreme Court at the Trial Term for the full amount of the verdict should not have been affirmed; and as the relinquishment of a part of the verdict by the plaintiffs, the whole of which they were entitled to retain, whether done upon their own motion or otherwise, cannot prejudice the defendant, the judgment below should be affirmed."

In Welsh *vs.* The German American Bank, 73 N. Y., the depositor's principal bookkeeper, who had charge of the

produce and bank-books, forged the endorsements on various checks, which were paid by the bank on whom they were drawn, who charged them in plaintiff's pass-book and returned the same with the other vouchers to the book-keeper once each month.

The fraud was not discovered by plaintiff for a long time, the period of the forgeries apparently running from April, 1872, to March, 1874, and during all that period the bank account was balanced each month. The clerk had charge of the matter. It was his duty to examine the bank account, and the plaintiff made no special examination of the account during the period in question.

That case reiterates the statement in Weisser *vs.* Denison as follows:

"In respect to the question of negligence, it was held that a depositor owes no duty to a bank which requires him to examine his pass-book or voucher with a view to the detection of the forgery of his name."

The bank was held liable for all the checks so paid on such forged endorsements, the Court of Appeals concluding this opinion with these words:

"The frauds committed upon the plaintiff and upon the bank were independent and unconnected frauds, and the fact that the plaintiff entrusted the check's to his clerk to send to Johnson, who forged the endorsements, made him no more responsible than if he had entrusted them to an expressman to carry to Johnson and the expressman had forged the name of the payee who passed them to the defendant."

Frank *vs.* The Chemical National Bank, 84 N. Y., was as follows:

In that case, the clerk of the depositors, between July 13, 1869, and September 26, 1870, forged a large number of checks and collected the money from the bank. Among other duties devolving upon him was, apparently, the charge of the check-book, he being the depositors' bookkeeper. He filled up the checks, but the same were signed by the depositors. He had charge of the bank account. The bank account was balanced four times during the period in question, and on each occasion the pass-book was returned with the amount of the forged checks charged.

In that case the depositors, on each occasion after the pass-book had been written up, made an examination of the account by comparing the checks returned by the clerk with the memorandum of the checks in the margin of the check-book, and they were found to correspond.

The clerk, however, read the entries, and it very clearly appeared that, by abstraction of the vouchers, and false balances and readings, he deceived the depositors, and prevented their ascertaining the forgeries until he had absconded in September, 1870.

The Court of Appeals again followed Weisser *vs.* Denison, and held the bank liable.

They used this language:

"It does not seem to be unreasonable, in view of the course of business and the custom of banks to surrender its vouchers on the periodical writing up of the accounts of depositors, to exact from the latter some attention to the account when it is made up, or to hold that the negligent omission of all examination may, when injury has resulted to the Bank, which it would not have suffered, if such examination had been made and the Bank had received timely notice of objections, preclude the depositor from afterward questioning its correctness. But where forged checks have been paid and charged in the account and returned to the depositor, he is under no duty to the Bank so to conduct the examination that it will necessarily lead to the discovery of the fraud. If he examines the vouchers personally and is himself deceived by the skilfull character of the forgery, his omission to discover it will not shift upon him the loss which in the first instance is the loss of the Bank. Banks are bound to know the signatures of their customers, and they pay checks purporting to be drawn by them at their peril. If the Bank pays forged checks, it commits the first fault. It cannot visit the consequences upon the innocent depositor, who after the fact, is also deceived by the simulated paper. *So if the depositor, in the ordinary course of business, commits the examination of the bank account and vouchers to clerks or agents, and they fail to discover checks which are forged, the duty of the depositor to the bank is discharged, although the principal, if he had made the examination personally, would have detected them.* The alleged duty, at most, only requires the depositor to use ordinary care; and if this is exercised, whether by himself or his agents, the Bank cannot justly complain, although the forgeries are not discovered until it is too late to retrieve its position or make reclamation from the forger."

These are the leading New York cases upon this question and it is submitted that they are directly in point. In the other States, where the case of Weisser against Denison has been considered, it also has been followed.

Manufacturers' National Bank *vs.* Barnes, 65 Ill., 69. In that case, on June 22, 1870, plaintiff gave a clerk a power of attorney to draw checks for fifteen days, which was lodged with the bank.

After the fifteen days expired, the clerk continued to draw occasional checks signing depositor's name, which he continued until the following January, the whole amount so drawn being $4,547.94 of which he applied $1,509.39 in paying debts of the firm and appropriated balance to his own use.

We quote:

"During this interval the bank-book of the firm had been several times written up and the paid checks returned, but as this had been attended to by the same clerk acting in his capacity of bookkeeper and cashier, the fact that he had been drawing checks after his power of attorney had expired was not discovered by the plaintiffs until January.

"Judgment was obtained in the Superior Court for the amount of the checks drawn by the clerk, less the sum applied by him to the debts of the firm for which the plaintiffs gave the bank credit.

"The case was tried by the Court without a jury, and it is insisted the Court erred in rendering judgment for any greater sum than the amount checked out by the clerk before the bank-book or pass-book of the plaintiffs was written up the first time, when all the checks were returned to the plaintiff. It is claimed that from that date, at least, the bank had the right to presume that the clerk had authority to draw checks.

"There is at first blush a certain plausibility in this view, but it will not bear examination. The same question arose in the case of Weisser *vs.* Denison, 10 N. Y., 68. There, as here, a clerk had drawn checks in the name of his employer, and the pass-book had been several times written up and the checks returned before the discovery of the fraud. The Court held that the balancing of the pass-book and the return of the checks are for the protection of the depositor and not for that of the bank, and the failure of the depositor to examine the checks is not such negligence on his part as to exonerate the bank from liability for the continued payment of checks improperly drawn. We do not agree with counsel for appellant in regarding the present case as stronger for the bank than that. In the case before us the checks drawn by the clerk showed upon their face that they were drawn by him, and the bank knew, by a document in its own possession, and which had been made the subject of a special conversation with one of its officers, that the clerk had authority to draw checks only for fifteen days from the 22d of June. The facts that the plaintiff had been thus careful to give the clerk express written authority and to limit it to fifteen days, and to lodge this authority with the bank in pursuance of a previous arrangement, were sufficient to show the bank hat the plaintiff had no intention of giving to the clerk a general authority to

draw. The bank was guilty of great negligence in paying checks of the clerk drawn after that period, and cannot be excused merely because the plaintiff failed to examine the returned checks which he had a right to presume had been drawn by himself alone.

"We consider the reasoning of the New York Court of Appeals in the case cited very satisfactory, and adopt its decision as the better rule."

National Bank *vs.* Tappan, 6 Kansas, 456.

There the bank paid out $3,000 of depositor's money on a forged acceptance on the 28th of October, 1868. The same day the bank sent the forged acceptance to the depositor. The bookkeeper who had charge of such matters for the depositor received it, and no information of the matter was given to the depositor, as the bookkeeper supposed the draft to be genuine. On the 1st of March, 1869, and with diligence after the forgery was discovered the depositor brought back the forged draft and made demand for the money.

Precisely the same defenses were raised as in the foregoing cases and in the case now before this Court. The Court, in a carefully-considered opinion, followed Weisser *vs.* Denison, and after considering Gloucester Bank *vs.* Salem Bank, 17 Massachusetts, 32, and the United States Bank *vs.* The Bank of Georgia, 10 Wheat., and the old case of Price *vs.* Neal, held in favor of the depositors.

And the doctrine of these cases appears now to be firmly settled as a fact in jurisprudence, which is well illustrated by the following extract from Morse on Banks and Banking at page 358:

"The effort has been made by the bank to have the writing up of the customer's bank-book and returning it to him together with the checks purporting to be vouchers, held to be equivalent to the rendition of an account stated, which, if not promptly rejected by the depositor as incorrect, is to be held binding on him so that he cannot afterward demand correction if a forged or altered check has been wrongfully charged to him. But the Courts have not accepted the doctrine, but have declared that the depositor is under no obligation to examine the checks returned to him and purporting to have been drawn by him, and that he is not concluded by his neglect so to do, and his consequent failure promptly to detect a false check."

It will be noticed on examination that in all of the foregoing cases the only questions of fact that were left to the jury were as to alleged forgeries.

The only other case that we have found where Weisser against Denison was considered is the case of Hardy Brothers *vs.* The Chesapeake Bank, 51 Maryland, 562.

In that case fourteen checks were forged by plaintiffs' confidential clerk, who had charge of their check book, balanced it and did everything exactly as Berlin did, and used, as did Berlin, his position to commit the fraud.

After the first five forgeries the pass-book was balanced and the forged vouchers returned to the plaintiffs.

At the trial the Court instructed the jury substantially that the plaintiffs were entitled to recover on the first five checks, but, at defendant's request, charged, substantially, that if the jury should find that the bank account was settled and balanced and the vouchers returned to them, and that the forger was their confidential clerk and had charge of the check-book and bank-book and that it was part of his duty to enter the checks of plaintiff in the bank-book and see that the balances were correct, and that the five forged checks were returned when the book was balanced, and that the defendant paid the five checks in the usual course of business, and that the plaintiff continued the account and that no intimation was given to the bank, and that all the checks had the same general character, that in that case plaintiffs were not entitled to recover.

Under these instructions the jury found for the defendant on the last nine checks, and the plaintiff appealed.

This ruling was reversed very largely on the authority of Weisser *vs.* Denison.

The Court say, at page 586:

"It must be borne in mind that the appellants were not bound at their peril and under all circumstances to detect the forgery. They were simply bound to refrain from doing any act that would reasonably have the effect of misleading the appellee (bank) to its hurt or injury and not fail to do any act that positive duty required them to do for the protection of the appellee."

And the Court say, at page 589,

"We, therefore, think that the jury should have been required to find either that the appellants had knowledge in fact that the forgeries had been committed, or that, from carelessness and indifference to the rights of others,

they failed to inform themselves from sources of information readily accessible to them, and which, by the exercise of ordinary diligence as business men, would have disclosed to them the fact that forgeries had been committed. * * * * * * * * * * * Then it must be also found, in order to work an estoppel, that the bank kept on paying checks in reference to the conduct of the appellant in failing to make known an objection to an account as stated."

And on the question of estoppel, after considering various decisions, the Court conclude

"And in the recent case of Arnold *vs.* The Bank, 1 C. P. Div., 578, where the principle was extensively discussed as to its application to the negligent conduct of the parties suing, it was held that, following the previous cases, negligence to create an estoppel must be in the transaction itself and be the approximate cause of leading the third party into mistake, and also must be the neglect of some duty which is owing to such third party or to the general public.

"What is such duty may not in all cases be easy to determine, but we think it is not too much to say that in a case like the present there is a duty owing from the customer to the bank to act with that ordinary diligence and care that prudent business men generally bestow in such cases in the examination and comparison of the debits and credits contained in his bank-book or pass-book in order to detect any errors or mistakes therein. More than this, under ordinary circumstances, could not be required."

Thus, in the Maryland case, the Court did not decide as matter of law whether or not the plaintiffs should recover.

There was, apparently, some question as to the fact of the forgeries, and the moment that arises all the surrounding circumstances, including the balancing of the account and the conduct of the plaintiffs, necessarily form an ingredient for the consideration of the jury. And while the latter quotation from this opinion would indicate that, in the judgment of that Court, the question of negligence might be for the jury in some cases, we respectfully submit that the New York cases are better considered on that point, and that, where there is no dispute whatever as to the facts, it is for the Court to determine whether the acts do or do not constitute negligence, and that in this case the Court below were right in holding as matter of law that the defendant had been guilty of no negligence that estopped him.

The plaintiff in error quotes three cases which are claimed to be in conflict with the above decisions.

They are American National Bank *vs.* Bushey, 45 Michigan, 135.

There the plaintiff closed his account entirely in October, 1872.

Three years later he was notified that he had a balance of $50.

He drew this out and had no further connection with the bank until 1877, when he claimed to have discovered some forged checks, one in 1871 and the other in 1872.

There was evidence in the case tending to show that plaintiff could not write, but had learned to sign by a signature meant to represent the name of Bushey, and that the checks had been paid with plaintiff's assent, and there was conflict of evidence as to the right of the party who had signed to do so.

The Court put the case to the jury upon the distinct grounds that there must be proof of either original authority or ratification of the execution of the checks in order to defeat plaintiff's right of recovery, and that the defendants had the burden of proof to make out this authority by a preponderance of testimony * * * and the balancing of the account in 1875 was entirely disregarded.

The Supreme Court reversed the judgment on the ground that the burden of proof was put on the wrong party and said in concluding:

"The Court should have held the account stated as such evidence as called upon plaintiff to bring himself within some rule that would allow him to impeach it and that the burthen was on him to impeach it."

We do not question this ruling.

He was bound to attack the account, treating it as a stated account, and the burden was on him to show the checks were not signed with his authority, and that he did not acquiesce in the payments.

City Bank of Macon, *vs.* Kent, 57 Georgia, 283. There the party drawing the money had a full power of attorney

and the element of ratification with knowledge came in which was of course a matter for the jury.

We, therefore, respectfully submit that the Michigan an Georgia cases are in no degree in conflict with the authorities that we have cited; that, on the contrary, they are i accord with them. We admit that, if there is any questio as to the forgery, or that, if any evidence is introduced o which the Court could permit the jury to find a ratificatio with knowledge, then the question must go to the jury accompanied, too, by all that may be gained from the ques tion of the account being stated.

The case of Dana *vs.* The National Bank of the Republic 132 Massachusetts, 156, is, however, opposed to the line of authorities we have quoted.

In that case the clerk of depositor erased name of paye and substituted the word bearer, and obtained the mone on the check.

On the first of the following month the account was bal anced and the altered check returned and, after anothe monthly statement, the depositor *drew out his balance a by the statements rendered, and made no objection unti twenty-three months after such payment.*

The Court held that, on the question of ratification, th defendant was not entitled to a charge that, if the plaintiff did not, after a reasonable opportunity to examine th checks, object to the payment of the check, they would b presumed to have ratified and adopted it.

The Court say:

"Whatever effect those facts might have as evidence, it is clear that th would raise no presumption of law that the plaintiffs ratified and adopted th payment and check.

"But the instructions given are open to objection. They were to th effect, and the jury must have understood from them that, unless the plaintiff had actual personal knowledge of the mistake in the monthly statements, al evidence in reference to them must be disregarded; and as it was not contended that there was any evidence of such knowledge, the effect was that there was no evidence of ratification left to the jury.

"We think that the evidence in respect to the monthly statements and other evidence bearing upon them, should have been submitted to the jury upon the question of implied ratification of the payment to Piper."

The Court, then, hold that Piper was plaintiff's agent for the purpose of examining the account, and say:

"If such examinations would have given them notice, if made by an honest agent, they cannot affect ignorance because they were made by a dishonest agent, who had fraudulent knowledge of the fact."

It will be noticed that no authorities are quoted in the above case, and as Weisser *vs.* Denison, 10 N. Y., 68, had been the established law of New York for years, it may well have been that the Supreme Court of Massachusetts would have reached a different conclusion if they had before them the reasoning in that case.

Besides there is no assignment of error touching this point.

The defendant in error never asked to go to the jury on the question of ratification.

No request raised this point.

The word ratification will not be found in his requests. What he claimed was estoppel and, though the principles that would apply to either proposition may be very close, and perhaps the evidence the same, yet there does remain a vital difference, and, had the plaintiff in error wished to raise that question, he should have done so in plain language.

The fact is, that the Massachusetts case was not then before the Court, and, we think, not even decided.

It will be noticed, however, that the Court do not submit the monthly statements alone as evidence of the ratification, but say that they think that the evidence in respect to the monthly statements, *and other evidence* bearing upon them, should have been submitted to the jury upon the question of implied ratification. *And on this point the depositor drawing out his balance and waiting 23 months was strong evidence against him.* It must be admitted, however, that the Court takes an entirely different view of the effect of the examination by the clerk, and we respectfully submit that the rule laid down in that Court is not the correct one.

Without much argument the Court laid down the rule

that the clerk was plaintiff's agent for the purpose of examining the account, which we may not perhaps dispute, but the conclusion they draw from that agency does not apparently consider the fact that he was a mere agent for the convenience of the depositor, not in the performance of any duty the depositor owed the Bank; that is, we claim that, at the most, the depositor if he ought to make some examination of his account then so long as he did not do it negligently, fulfilled his duty. Therefore, if he employed a proper person to make the examination against whom he knew nothing, he was guilty of no negligence, and the fact of the failure of that agent to perform his duty would not charge him with any loss resulting therefrom.

We say the Court did not apparently consider this suggestion nor the fact that the acts of the agent were outside the scope of his authority, nor that they were tortuous and criminal. They simply say:

"If such examinations would have given them notice, if made by an honest agent, they cannot affect ignorance because they were made by a dishonest agent who had fraudulent knowledge of the fact."

But this question of agency will be further considered in another Point.

SECOND POINT.

The only effect of an account stated is to cast the burden of proof upon the complaining party to show fraud, error or mistake.

This is the doctrine of all the above cases, and of the following:

National Bank *vs.* Whitman, 94 U. S., 343, 346.
Manhattan Company *vs.* Lydig, 4 John., 377.
Phillips *vs.* Belden, 1 Edwards Chancery Reports, 1.
Kinsman *vs.* Barker, 14 Vesey, 579.
Burke *vs.* Boyd, 2 Edwards Chancery, 293.
Barrow *vs.* Rhinelander, 1 Johnson's Chancery, 550.

The same rule applies in law and equity.

Perkins *vs.* Hart, 11 Wheaton, 237.
1 Story's Equity Jurisprudence, Sections 523, 528 and 529.

And, after holding that after lapse of reasonable time account rendered becomes admitted as correct, the Court, in Hardy *vs.* Chesapeake Bank, 51 Maryland, say (p. 587):

"The presumption is liable to be repelled by showing that the error or fraud complained of was not discoverable by the exercise of reasonable care and diligence, or that there was no such appearance of things as to excite the suspicion of a reasonable man, or that for any reason the party had not had an opportunity to examine the account."

Manhattan Company *vs.* Lydig, 4 Johns., 377, is a leading case on that point.

There the depositor entrusted a clerk in the bank to make deposits for him.

The clerk stole the money but made entries of the deposits in the pass-book of the depositor and also in some of the books of the bank.

The depositor's book was written up several times before the frauds were discovered and settled on the basis of these deposits having been made.

The Court in reversing a judgment in favor of defendant held:

"If the defendant's account with the bank be considered as balanced by the officers of the bank having competent authority for that purpose, as it appears to me it must, still the cases of Vernon *vs.* Vaudry (2 Atk., 119) and Brownell *vs.* Brownell (2 Bro. C. C., 62) are authorities for saying that though the whole account cannot be opened after such a lapse of time yet that the particular items may be faisified."

Wiggins *vs.* Burkham, 10 Wallace, 132, holds where the account is admitted in evidence as a stated one the burden of showing its incorrectness is thrown upon the other party. He may prove fraud, omission or mistake, and in these mistakes he is in no way concluded by the party employed and from his silence after it was rendered.

Agricultural Savings and Loan Association *vs.* Federal Bank, Appeal Reports, Canada, Volume 6, page 192, holding that an account being stated between bank and depositor and usual acknowledgment of correctness being signed, does not preclude depositor from questioning the same where endorsement on one of the vouchers forged.

And it was on this question, by reason of an erroneous charge as to where the burden of proof lay after an account had been stated, that the Michigan case relied on by plaintiff in error was largely reversed.

Hutchinson *vs.* Market Bank of Troy, 48 Barb., 302. There, in July, 1856, plaintiff left draft for collection. The bank-book was written up in August and balances were struck and vouchers were delivered up to him repeatedly afterwards until April, 1859, when he drew out the balance remaining to his credit.

In 1862 he brought suit for the face of the draft, claiming it had never been credited to him. The bank claimed that they had paid it in cash at the time of deposit.

Apparently plaintiff examined his own bank account.

The verdict in his favor was sustained at General Term,

the Court saying at page 324 that the accounts rendered by the bank were accounts stated, but that the only advantage that the stating of an account gives is that it changes the burden of proof and is never an estoppel.

Even the acknowledgment by the depositor or maker that the forged signature is genuine does not cut him off from recovery, if such an acknowledgment be made after the bank has paid the money.

Hall *vs.* Huse, 10 Massachusetts, 40.
Salem Bank *vs.* Gloucester Bank, 17 Massachusetts, 1, 27.
Barber *vs.* Gingell, 3 Esp., 60.

THIRD POINT.

A bank is liable to its depositor for any material alteration in a check drawn thereon.

Hall *vs.* Fuller, 5 B. & C., 750.

Nor is the depositor bound to suspect that the person with whom he deals will commit forgery whenever the opportunity arises, and, therefore, it is not necessary for a person drawing a check to exclude the possibility of any addition or alteration. It is sufficient to fill in the ordinary way.

Société Générale *vs.* Metropolitan Bank, 27 Law Times, N. S., 849.

Bank is bound to know customer's signature, and pays forged check in its own wrong, even if customer, by

loss of check-book, has contributed to success of forgery.

Bank of Ireland *vs.* Evan's Charities, 5 House Lord Cases, 389.

Bank's own wrong.

Price *vs.* Neal, 3 Burr, 1354.
Goddard *vs.* Merchants' Bank, 4 Comstock, 147.
Bank of Commerce *vs.* Union Bank, 3 Comstock, 230.
Bank of St. Louis *vs.* Farmers' Bank, 10 Vermont, 141.

Authorities to show that the material alteration of a written instrument renders it void are unnecessary, as it is a principle of universal application.

Angle *vs.* New York Mutual Life Insurance Co., 92 United States, 330, 342. This was a case where blanks had been left in the application for a loan, but where the agent altered the printed parts.

A bank which receives money on deposit and then pays it out is justly held to the obligation to know the signature of its depositors to their checks, and if it pays in mistake a forged check there is no reason why the loss should be shifted to another innocent party upon whom the law casts no such obligation.

See cases collected in the Maryland case above cited, namely, Volume 51 of Maryland Reports, at page 577.

The alteration of a check is the same thing as its forgery.

White *vs.* Delaware Bank, 64 N. Y., 316.
Marine National Bank *vs.* National City Bank, 59 N. Y., 77.

Bank paying out funds of firm on individual check of one of the members liable, even though he told bank he had drawn it by mistake.

Coote *vs.* Bank of the United States, 3 Cranch, C. C., 50–95.

The alteration of date in commercial paper, even if it delay the time of payment, is a material alteration, and, if made without the consent of the party sought to be charged, extinguishes his liability.

Wood *vs.* Steele, 6 Wallace, 80.

And the same doctrine has just been held by the Court of Appeals of New York, where the change advanced the date of payment.

Crawford *vs.* The West Side Bank, decided in October, 1885.

The manuscript opinion in this case is a thorough collection of the law on this subject.

And a case quite similar to the one before the Court now is Oddie *vs.* The National City Bank, 45 N. Y., 735. There a dealer drew checks in blank and left them with bookkeeper to be filled up. The bookkeeper handed some to a clerk, who filled them up with proper names, dates and amounts. Bookkeeper then examined them and delivered them to same clerk for mailing. The clerk then erased the words "Or order" and inserted "Or bearer" and obtained money from bank, who were held liable.

See also Belknap *vs.* National Bank, 100 Massachusetts, 376.

FOURTH POINT.

The principal is only bound by his agent while acting in the course of an employment, affecting a third person.

The claim that Berlin's knowledge is Cooper's knowledge, and that Cooper stands chargeable in the same manner as if he had known what Berlin did on the theory of the relation of principal and agent existing between them is

fallacious. To establish anything, it becomes necessary for the defendant in error to claim that Berlin was Cooper's ear, his eye, his brain, his hand—himself; not for the purposes of his employment, but for all purposes, and he calmly states a quotation somewhat to this effect in his brief.

It was on this view that the Massachusetts case went, or in other words, that the moment a man employs another to do any act for him, though in fact he does not know what the man does, he is to be charged in all his relations with the rest of the world as if he had that knowledge.

This is not the law. Agencies are of various characters and many kinds. The power may be so sweeping as to make the agent take the place of the principal in all his dealings with the world.

It may be so general as to make the agent take the place of the principal in all his dealings with certain classes or in a certain business, or the agency may be so limited that the power of the agent is simply to carry a letter or deliver a parcel.

The agency may be of the kind that authorizes the agent to deal for the principal with the whole world. It may be of a kind that authorizes the agent to deal in the name of the principal with certain classes or in a certain business, or it may be of a kind that only authorizes the agent to deal with and for the principal, or it may be, as in the case at bar, of a kind in which no other person has any interest, except the principal himself.

It is claimed that the depositor owed a duty to the bank to make some examination of his account. It will not be seriously contended that he was bound to make an examination which of necessity would result then and there in the discovery of all improper charges. It was held in Weisser *vs* Denison and several of the cases that followed it that the depositor was not bound to make any examination.

The doctrine of the Maryland case and of Frank *vs.* The Chemical Bank, 84 N. Y., would seem to imply that the depositor owed a duty to make some examination and that,

unless he was negligent in that work, the bank would have no cause of complaint.

Now, the depositor could do this work himself, if he pleased. If he failed to do it thoroughly, as long as he did it honestly, there could be no complaint. He could do it with the assistance of a clerk, as in the Chemical Bank case. If deceived by the clerk, he had performed his duty. He could do it by entrusting the work to a competent person and, if that person failed to discover errors, the depositor would have performed his duty. He could do it by entrusting the work to a competent clerk, and, if that clerk fraudulently performed his duty, or if he failed to perform it at all, still the depositor would have done his duty and been guilty of no negligence.

It was this that Cooper did. He employed a man whom he had known since he was twelve years of age and in whom he had every confidence, and whose family he had known, to do this work. He looked over the vouchers himself, he drew his checks with great care, filled in lines and crosses so that alterations could not take place. From time to time he looked at his bank books occasionally adding up footings, and once discovered during the period in question an error, and spoke to Berlin about it, who replied that he was very seldom caught in a mistake, and Cooper swears that he believed him.

What we urge is that, so long as Cooper employed a party whom he believed competent and honest, and against whom he knew nothing, he fulfilled his duty.

He was not bound to do anything more.

As is the doctrine of the above cases, he was not at his peril bound to ascertain at once any errors in the account. At the best, he was only bound not to be utterly regardless of the rights of the bank.

The cases that hold these views are numerous.

Thus a warehouseman is not responsible for goods stolen or embezzled by his servant unless it is shown that he had reason to distrust the servant.

Schmidt *vs.* Blood, 9 Wend., 268. He owes some duty

to his bailors, but if he exercises his best judgment in the employment of servants he has fulfilled that duty.

So also in considering the duties owed by a master to his servant concerning injuries received from the acts of co-servants.

It is held that that duty is performed so long as the master does his best to supply skillful and competent persons to perform the different services required.

Warner *vs.* Erie R.R. Co., 39 N. Y., 468.
Wright *vs.* N. Y. Cent., 25 N. Y. 562.
Baulec *vs.* The N. Y. Central & Hudson River R.R. Co., 62 Barb., 623.

Nor can a man be convicted of a crime because of his agent's knowledge being imputed to him.

Regina *vs.* Stephens, Law Rep., 1 Q. B., 702.
Deerfield *vs.* Delano, 1 Pick., 465.

Again, the agent is not the principal for all purposes. See the following quotation in Story on Agency, at Section 136, to the effect:

"That, if it was a material fact that there was the bond of the defendant in the hands of the principal, that fact would not be proved by the assertion that the agent, supposing him an agent, had said there was, for that is no fact; that is no part of any agreement which the agent is making or of any statement he is making as inducement to an agreement * * * * The admission of the agent cannot be assimilated to the admission of the principal. A party is bound by his own admission and is not permitted to contradict it. But it is impossible to say that a man is precluded from questioning or contradicting anything any person has asserted as to him as to his conduct or his agreement, merely because that person has been an agent of his."

The following quotations in the cases on which we have relied in this action show how this precise point has been heretofore met and answered.

In Weisser *vs.* Denison, the Court say (p. 76):

"It is said that Harlin settled the account with the bank as the agent of Weisser, and that the agent having knowledge of the forgeries and that the charges in dispute were based upon such forgeries, the principal was affected by the knowledge of the agent and must be deemed to have acted in person with full

knowledge of all the facts, and thus to have acquiesced in the payment of the forged checks from his funds. The principle that notice to an agent is notice to the principal is quite familiar, but is only applicable to cases in which the agent is acting in the course of his employment. Were it otherwise, and did it extend to acts unauthorized and outside of the employment, whether trespasses or even felonies, the master might be made responsible for all acts, whether tortuous or otherwise, done by his servant while in his employ or acting professedly in his behalf, if he did not act at once by disclaiming the authority. The servant would necessarily have knowledge of his own wrongful act, and within the rules sought to be applied the knowledge of the servant would be that of his master; and if the latter, having knowledge, should not object, he might be deemed to acquiesce. He would thus, by a legal fiction, be charged with the tortuous, fraudulent or even felonious act of his servant. This is not the law (Foster *vs.* Essex Bank, 17 Massachusetts, 478; Lewis *vs.* Read, 13 Mees & Wels, 834; Lyons *vs.* Martin, 8 Adol. & Ell., 512; Schmidt *vs* Blood, 9 Wend., 268; Vanderbilt *v.* The Richmond Turnpike Company, 2 N. Y., 479). * * * * *

"But there was no settlement with the bank except such as resulted from the acquiescence of the plaintiffs' intestate in the account by his silence. *The examination of the account by Harlin was not a transaction with the bank, or in which they had any interest or of which they had any knowledge. It was a matter between Weisser and his clerk for the information of the former, and whether faithfully or* honestly done is not material to the defendant."

It was into this legal fiction that we submit the Massachusetts Court fell.

In Hardy Brothers *vs.* Chesapeake Bank, 51 Maryland, the Court on this point say (p. 587):

"It is insisted, however, that, as Holmes was the confidential clerk of the appellants, and was entrusted to make the entry of all checks in the bank-book, and did make the entries as well of the forged checks as all others, he acted as the agent of the appellants, and his acts and his knowledge in respect to these entries are to be taken as the acts and the knowledge of the appellants themselves; and upon this imputed knowledge they should be taken to have acquiesced in the entries of the forged checks.

"And, therefore, as to the fact of knowledge on the part of the appellants, it is only necessary that the jury should be required to find that the forged checks were entered in the bank-book by Holmes, the alleged forger, in order to find and conclude the appellants. But it is clear, we think, such position can neither be supported upon principle or authority.

"It is conceded that Holmes did not act as agent in drawing the checks, and, if the appellants are not liable in respect to the fraudulent drawing, we do not perceive upon what principle they can be bound or made liable in respect to the fraudulent entry of those checks in the bank-book. Holmes was not an agent for any such purpose, and the principle is too well settled to require the citation of authorities for its support that the principal is bound by

the acts of his agent only so far as the agent acts within the limits and scope of his employment. The fraudulent knowledge of the agent in regard to acts and transactions outside of and beyond his employment cannot be imputed to his principal. To do so would work the grossest injustice, and lead to the most anomalous consequences."

FIFTH POINT.

The only duty that the depositor owed was to acquaint the bank with the fact of the forgery as soon as he learned it.

White *vs.* Continental Bank, 64 N. Y., 316.
Corn Exchange Bank *vs.* Nassau Bank, 91 N. Y., 74.

SIXTH POINT.

There is no estoppel.

(a.) Estoppel in pais can only avail where the position of the parties is changed.

(b.) Each forgery was an independent one. Each payment was a wrongful one on the part of the bank. They have no right to claim that they would have ceased doing wrong if the depositor had informed them of the wrongful acts of their clerks.

(c.) The plea cannot avail because there is no evidence to show that, had the bank had earlier knowledge, they could have recouped against the forger.

As to the main question involved in this point, we wish only to assert that there is no estoppel because until Cooper

had knowledge he could not act. It is not disputed that, as soon as he had knowledge he did act.

"An estoppel *in pais* does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury and he only can set it up. If, therefore, there be any estoppel in this case, it must be in favor of some bondholder (if any there was) who was led to believe by the action of William B. Duncan that the railroad company was, in May and November, 1874, paying the coupons of the first mortgage then falling due and paying them for the purpose of extinguishment. But no such bondholder asserts such an estoppel. So far as it appears, no one of the appellants was so misled. No one claims an estoppel which is personal and of which only the person misled to his hurt can avail."

Ketcham *vs.* Duncan, 96 U. S., 659, 666. Above was an Alabama R.R. case where the question arose as to whether coupons taken up by Duncan, Sherman & Co. continued as liens against the road.

Now to work an estoppel, the rule of law is clear that, where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things and induces him to act on that behalf so as to alter his own previous position, then the former is concluded from averring a different state of things as existing at the same time.

Bronson, *Justice*, in Dezell vs. Odell, 3 Hill, 222, says:

"It must appear (1) that he has made an admission which is clearly inconsistent with the evidence which he professes to give or the title or claim which he professes to state, but (2) that the other party acted on the admission and (3) that he would be injured by allowing proof of the admission to be disproved."

See also Hermann on Estoppel, page 8 and pages 334 and 335.

"Wherever an act is done or a statement made by a party which cannot be contravened or contradicted without fraud on his part and injury to others, whose conduct has been influenced by the act or omission, the character of an estoppel will attach, &c."

"But (page 341) parties are only estopped from denying their own acts when the denial operates to the injury of another."

People *vs.* Brown, 67 Illinois, 435.
Martin *vs.* Zellerbach, 38 California, 300-315.

McKenzie *vs.* The British London Company, House of Lords, 44 Law Times, New Series, 431, where the appellant's name had been forged to a bill of exchange, and on the same becoming due the bank omitted to inform him of the fact, but he allowed a fortnight to elapse before he informed them that his signature was a forgery. The House of Lords, in reversing the judgment below, held that the appellant was not liable on the bill, and was not estopped from setting up the forgery, inasmuch as it appeared that the position of the bank was in no way altered for the worse during the interval.

Perhaps no clearer exposition of the law of estoppel will be found than in one of the cases relied upon by the plaintiff in error, the Continental National Bank *vs.* The Bank of Commonwealth, in 50 N. Y., at page 575. In that case the plaintiff recognized and pronounced as genuine its forged certification of a check for $50,000 which had been presented in payment for gold coin. The clerk who made the inquiry for the holder was absent about two minutes, but before he returned the gold had been delivered thus: $40,000 in gold checks on the Bank of New York; $10,000 in gold certificates, issued by the Treasury.

The evidence showed that the forger took the checks to the Bank of New York, who refused payment until he was identified, and ten or fifteen minutes elapsed before he got the money. That day or the next he fled the country.

The forgery was discovered forty-eight hours after the aforesaid transactions, but not until after the check had been collected through the Clearing House.

In an action, brought by the bank on whom the check was drawn, against the collecting bank, who represented the holder, the defendant had verdict on the ground of estoppel *in pais*. The plaintiff claimed on appeal that the defendant had not acted on the representation, and it was on this point that the Court collected the facts, and held that the defendants showed they were damaged.

The trial Judge charged that to set up estoppel Cronise & Company, the holders of the check in question, must have

had time to have stopped payment of the gold; that the circumstances must have been such that they could with reasonable diligence have arrested the crime in its consummation, and have secured the gold.

This, say the Court of Appeals, put the jury on the proper inquiry.

Now, while the Court of Appeals used the language cited in the brief of plaintiff in error, they applied it only by showing that the evidence justified a finding that the bankers could, as matter of fact, have secured the gold if plaintiff had not put them off their guard. The evidence clearly showed that the $40,000 gold checks on the Bank of New York could have been saved. It was not so clear as to the Treasury check, but the majority of the Court thought the evidence sufficient, as the forger would have been caught at the Bank of New York, and then opportunity had to save the Treasury certificates. On the latter point Judge Rapallo dissented.

But the Court of Appeals in later cases have distinctly shown that the principle will be applied by them only where the facts justify it.

Thus in National Bank of Commerce *vs.* The National Mechanics' Banking Association, 55 New York, 211, it appeared that a check dated February 15, 1870, after being certified by plaintiff was raised and deposited with defendant. On the 17th plaintiff paid check to defendant. On the 1st of March the forgery was discovered and notice given. Plaintiff recovered the raised amount. The Court refused to submit to the jury the question whether defendant was injured by delay in giving notice. On this point the Court of Appeals say, page 217:

"Delay in discovering and giving notice of the mistake is complained of, but the evidence shows that notice was given immediately on the discovery of the mistake, and it fails to show that by the failure to receive earlier notice any damage was sustained by the defendant."

In White *vs.* The Continental National Bank, 64 New York, 316, the facts were as follows:

Draft on plaintiffs was received by New York bankers

August 16, 1869, and they sent avails to the holder in a sixty-day bill on London. Draft was accepted by plaintiffs and made payable at Leather Manufacturers' National Bank and collected by the defendant, who had received it on deposit.

The plaintiffs rendered an account containing this draft to the drawer early in September, but he did not examine the account until October 5, when the alteration was discovered and notice given. The Court charged that, if the jury believed that if the New York bankers who had issued the draft in payment had been informed in a reasonable time that the draft was raised, they could have taken steps to trace and arrest the crime in its consummation and have prevented the acceptance of the bill of exchange, and that they failed to take such steps because plaintiffs failed to notify until October 6, then the plaintiffs were estopped, &c.

The Court of Appeals in reversing the judgment, say :

"In the case at bar, it is the merest conjecture with scarcely a possibility to support it, that the defendant or those from whom he received the bill could at any time after the transmission of the foreign bill of exchange to Baltimore have taken any effectual measures either for arresting the swindler or reclaiming the bill bought and paid for upon the credit of the draft. Estoppels cannot be based upon mere conjectures, even if a proper foundation is laid for them in other respects."

Thus it will be seen that our Courts require some proof of damage before they allow an estoppel.

Absolutely none was offered in this case. Evidence was received from the president of the bank that, if he had been told so and so, he would have arrested Berlin. This Court cannot conjecture that that would have been of any avail. There was no evidence introduced to show that by prompt notice they could have recovered from him the proceeds. The plaintiff in error offered no evidence to show, as was done in the case of the Corn Exchange Bank against the Nassau Bank, 91 N. Y., 74, that the forger kept an account during all the intervening periods, which was good for the amount of the check until just before the discovery of the

forgery. They offered no evidence as was done in that case that, had the entries been discovered earlier, the defendant might have protected itself from loss by calling on the forger for reimbursement, and yet, in the case we refer to the evidence went for nothing because the Court held the defendant bank liable on the guarantee of the endorsement.

What we urge is that the plaintiff in error here was bound to have shown to the Court, as was shown in the case that he relies on in the 50th N. Y. some facts on which a jury would have been justified in making a verdict that the bank had been misled to its prejudice by Mr. Cooper failing to give earlier notice.

The fact is the plaintiff in error has mistaken the position that he should have urged. Estoppel never could avail him. Ratification might, but only if he had produced some other evidence to have justified the jury in finding a ratification. Beside all this, there is nothing in the case to show that plaintiff in error could not readily have arrested Berlin after the discovery of the forgeries.

We again respectfully submit to the Court that the plea cannot be availed of because the bank has no right to demand of its depositor that he point out to the bank its own own wrong in paying forged checks so that the bank may not again commit against itself the same wrong.

It is true that the president swears that, if he had known of the first two forgeries he would have told his tellers not to pay any more checks of Mr. Cooper, the bodies of which were in the handwriting of Berlin. But here again the plaintiff in error is at fault, for the depositor owed them no duty to give them that sort of protection. Even if the depositor had known of the forgeries, he would not have been liable to the bank upon any such theory. He would have been liable in such a case because the bank could have assumed that he ratified the act of his business clerk.

The cases cited by the plaintiff in error on this point, though perhaps correct expositions of the law have no application to the facts here.

Thus in Knight *vs.* Whiffin, Law Reports, Queen's Bench, 660, the defendant expressly approved an order on him for for a quantity of barley saying. "All right; when you receive the forwarding note, I will place the barley on the line." He afterwards attempted to set up a vendor's lien for the purchase price, but of course this was held against him.

In Hopkins *vs.* Ware, 38 Law Journal, N. S., Ex. 147, plaintiff neglected to present a check from 11th May to June 9. Court found that if check had been presented before June 4, there was a reasonable chance it would have been honored. On familiar views, the Court held against plaintiff in his suit on the note in payment for which the check was given.

SEVENTH POINT.

There was no negligence on the part of the depositor. The bank was guilty of gross negligence.

The depositor's position has been fully stated under the fourth point. The position of the bank will be best seen by an examination of the two checks last paid by them, which were not destroyed by Berlin. The forgeries were palpable at sight. They have been in possession of counsel preparing this brief, since their return by the bank to Mr. Cooper, and we assert that there has been no change of any kind. The bank should be held liable for its gross negligence in paying checks where the alteration was so plain.

This is not the case of a bank being held liable for the receipt and acknowledgment of its own bills or drafts or checks drawn on it, nor is it a suit between banks where one of them seeks to recover against the other for an alteration in the check. Different and well settled rules of law

apply there, and the authorities quoted by the plaintiff in error, which settled the law in that class of cases, have no application here to help him.

Thus we do not dispute the well-settled principle that the contract between a bank and its depositor, is the plain one of debtor and creditor, or that as between the bank on whom check is drawn, and any third party, they are not bound to know the filling up of the check ; nor do we deny that it is the custom of banks to render accounts from time to time, and that their checks being their only vouchers, the account becomes a stated account ; nor that the principal is bound by the act of his attorney, to whom he confides money to invest in not properly performing that duty ; nor do we deny the laying down of the principle in the cases of the United States Bank *vs.* The Bank of Georgia, 10 Wheaton, and Gloucester Bank *vs.* The Salem Bank, in the 17th of Mass., 32, that the law will presume damage where the bank receives its own bills, and gives credit therefor to a party producing them. But these principles will be treated as applicable to the cases where they were pronounced, for it has always been the settled law of this country, that the bank pays the check of its depositor or receipts its own bills at its peril, and no Courts have gone further than the Federal Courts in maintaining that proposition, which is as essential to the protection of the business community, as that the bank also pays the check of its depositor in its own wrong, if it be forged.

Thus in Levy *vs.* The Bank of the United States, 4 Dallas, 234 (approved in 10 Wheat., 347–357), the Court held that a forged check, when received by the defendant on deposit, bound it, though the forgery was discovered almost immediately afterward.

But it is said that in Massachusetts, this old rule no longer exists. For in National Bank of North America *vs.* Bangs, 106 Mass., 441, the bank on whom the check was drawn was allowed to recover back from the party to whom it had paid.

And this decision is criticised in Morse on Banking, at page 334.

We therefore suggest that the Courts of the State of Massachusetts may have erred on the subject of Banking Law, as well in this as in the case relied on by the plaintiff in error to overturn the Banking Law of the country on the point now in controversy as we believe we have shown it to have stood for many years.

EIGHTH POINT.

The defendant in error was entitled to a direction in his favor on his second cause of action.

The endorsement is plain, and was a special endorsement, and reads, "For deposit in Leather Manufacturers' National Bank to the credit of W. B. Cooper, Jr., Agent for Ashburner & Co." The endorsement was restrictive. The bank could only make one use of the check, namely, credit the account of Ashburner & Co. with the proceeds.

Lee *vs.* Chilliclothe Bank, 1 Bond, 387.
First National Bank *vs.* Reno Co., 3 Fed. Reporter, 257.

With the endorsement in question on the check Berlin could make no use of it for his own benefit. The endorser could recover against any person who made or assisted Berlin to make any use of it except to credit the depositor's account.

Hook *vs.* Pratt, 78 N. Y., 371.
Claflin *vs.* Wilson, 51 Iowa, 15.
Towsell *vs.* National Life Ins. Co., 97 Ill., 9.
Sigourney *vs.* Lloyd, 8 B. & C., 622.
Treuttel *vs.* Barandon, 8 Taunt., 100.
White *vs.* National Bank, 102 U. S., 658.
Mechanics' Bank *vs.* Valley Packing Company, 4 Mo. App., 200; 70 Mo., 643.

Indeed, the Courts of Connecticut have gone even further. (Bristol Knife Co. *vs.* First National Bank, 41 Conn., 421.)

In that case plaintiff endorsed check as follows: "Pay to order Cashier First National Bank" and sent it in a closed envelope with a deposit ticket.

The messenger broke open the envelope and took out the check and stated to the bank that the holder of the check wanted the currency.

This was given him and he absconded with it.

The plaintiff recovered against the bank and the judgment was affirmed.

The affirmance went on the ground of the messenger acting beyond the scope of his agency, and the negligence of the bank in view of the form of the endorsement in paying over the money.

NINTH POINT.

There being no conflict of evidence, and the evidence being of such a character as to compel the setting aside of a verdict in favor of the defendant, the Court was bound to direct in favor of the plaintiff.

Where the facts are clear, it is always a question exclusively for the Court.

Where the proofs are conflicting, the question is a mixed one of law and of fact. In such cases the Court should instruct the jury as to the law upon the several hypotheses of fact insisted upon by the parties.

Wiggins *vs.* Berkham, 10 Wallace, 132.
Boland *vs.* Sprague, 12 Peters, 335.
Baylis *vs.* Travellers' Ins., 113 U. S., 316.
Randall *vs.* Baltimore & Ohio R.R. Co., 109 U. S., 478.
Pleasants *vs.* Fant, 22 Wallace, 116.
Anderson Co. Comrs. *vs.* Beal, 113 U. S., 227, 241.

While it is true that the Court did not make use of the expression that the direction was given because any verdict would have to be set aside yet such was the intent and fact.

Negligence may be a question of fact or of law or both.

What is due care is for the Court. Whether that due care was exercised is for the jury.

Smith's Leading Cases, Note to Cogg's *vs.* Bernard, Vol. 1, pt. 1, p. 471. 8th Ed.
Rowland *vs.* Jones, 73 N. C., 52.
Poule *vs.* R.R. Co., 56 Wisc., 227.

That when on the most favorable construction of the facts the evidence is insufficient to sustain a finding of negligence it becomes the duty of the Court to direct that there is no negligence as matter of law. See

Randall *vs.* Baltimore & Ohio R.R. Co., 109 U. S., 482.

Justice Gray there uses this language:

"And it has recently been decided by the House of Lords upon careful consideration of the previous cases in England that it is for the Judge to say whether any facts have been established by sufficient evidence from which negligence can be reasonably and legitimately inferred."

Citing Metropolitan R.R. Co. *vs.* Jackson, 3 App. Cases, 193.

And on this question of negligence it must be borne in mind that the burden of proof was not on the plaintiff.

The defendant avers negligence as a defense. If either side were bound to introduce evidence as to whether Cooper's action was that of an ordinary business man the defendant should have done so, for the burden of proof on that point was with him.

Hough *vs.* R.R. Co., 100 U. S., 213, 225. Holding that in an action for personal injury the burden of proof to show negligence was on the defendant.

Sherman and Redfield on negligence, Sec. 12, reading:

"The burden of proof in an action upon negligence always rests upon the party charging it, whom for convenience we may assume to be, as he almost invariably is, the plaintiff in the action."

In this case, the forgeries were proved and not denied. The relations between Cooper and Berlin were proved and not denied. The work that Berlin did was proved and not questioned. There was no possible question of fact for the jury to pass on. There was no issue made. The Court would have been obliged to instruct the jury, in accordance with the foregoing points, that the plaintiffs were entitled to recover, if the checks were, in fact, forged or altered by Berlin; and, as the evidence on that point was all one way, there was no necessity of going to the jury. There could be nothing to go to the jury, as to ratification, or estoppel, or negligence, because, if these points were properly raised, the Court had to decide them as matters of law. If this Court shall hold that Mr. Cooper was not bound to examine the account at all, as is the New York doctrine, that ends the question.

If this Court shall hold that Mr. Cooper owed some duty, and was bound to have his account examined at some reasonable time and in some proper manner, then the evidence shows that he did have it examined by a trusted clerk, and it is respectfully submitted that this Court cannot draw from that, any inference of negligence on his part, and if the plaintiff in error had wished to raise the question on that point, it should have introduced evidence at the trial that showed that his manner of conducting his business was negligent. It did not do so, and it was left for the Court to determine on the evidence given, as matter of law, whether he was negligent or not. If the Court shall decide as we think, the weight of authority in this country is, that Mr. Cooper, in employing a trusted agent to do that work, was not guilty of negligence, then this Court must hold that the Court below were right in directing a verdict.

As to the assignments of error, founded upon the requests to charge, we have only to say, as did the Court below,

that, though some part of them may have been correct in the abstract, yet upon the entire evidence, the plaintiff being entitled to recover, there was no object in charging any of them.

If this Court should differ with the remarks of the learned Judge below, that in his judgment, Mr. Cooper was under no duty to the Bank, in reference to the examination of the monthly balances and statements of account, yet, should conclude that any duty he owed, was fulfilled by his entrusting the examination to his trusted clerk, the judgment should be affirmed within the principles laid down in Marvin *vs.* Universal Life Insurance Co., 85 N. Y., 278, to the effect that, a correct decision will not be reversed, even though the Court above should not be satisfied with the reasoning of the Court below.

LAST POINT.

The judgment should be affirmed.

JOHN M. BOWERS,
For Defendant in Error.

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Supreme Court of the United States.

IN ERROR TO THE

CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE LEATHER MANUFACTURERS' NATIONAL BANK,

(Deft.) Plaintiff in Error,

vs.

EDMOND CHARLES MORGAN et al.,

(Pltfs.) Defendants in Error.

Supplement to Brief for Defendants in Error.

JOHN M. BOWERS,

For Defendants in Error.

Supreme Court of the United States.

IN ERROR TO THE

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FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE LEATHER MANUFACTURERS' NATIONAL BANK,
(*Deft.*) *Plaintiff in Error,*

vs.

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(*Plffs.*) *Defts. in Error.*

In answer to the suggestion that Berlin, in making the alterations, may have acted within the scope of his agency, we desire to say:

Each check, as appears in the record, p. 23, had ✖ and a —— drawn after the payee's name and after the amount, as written and in figures.

No question could therefore arise as to negligence in filling up the checks, nor was any such question raised.

After the checks were signed and delivered to Berlin for the purpose of collecting the amount for which they were drawn from the bank, or for the purpose of delivering the same to the payees, he became the agent of the depositor for such purposes and no others. He had no more right

to alter the checks, because he had originally filled them up, than any other person had.

Angle *vs.* N. W. Mutual Life Ins. Co., 92 U. S., 330.

Mahaiwe Bank *vs.* Douglass, 31 Conn., 170.

Where endorser was discharged—because maker after the endorsement altered the paper.

Belknap *vs.* National Bank of North America, 100 Mass., 376.

In this case, the clerk who had filled up the checks was intrusted with the same to mail.

He altered the checks by filling in the words *or bearer*.

(In the brief of defendants in error, the facts of this case are stated as applicable to Oddie *vs.* National City Bank, 45 N. Y., 735, which arose from an error in printing, the two cases appearing on the same page of the brief, viz.: page 21.)

Further authorities on this point are found in the 3d point of brief, filed for defendant in error, and in addition we submit the opinion of the Court of Appeals, in Crawford *vs.* West Side Bank, decided October, 1885, which bears on the question of checks being altered by clerks of depositors, and collects authorities as to altered instruments. The opinion is by Ruger, *C. J.*:

"The relation existing between a bank and its depositor is, in a strict sense, that of debtor and creditor; but in discharging its obligation as a debtor, the bank must do so subject to the rules obtaining between principal and agent. In disbursing the customer's funds, it can pay them only in the usual course of business and in conformity to his directions. In debiting his account, it is not entitled to charge any payments except those made at the time when, to the person to whom and for the amount authorized by him (Wheeler *v.* Gould, 20 Pick., 545; Daniels on Neg. Inst.,

1658). It receives the depositor's funds upon the condition of disbursing them according to his order, and upon an accounting is liable for all such sums deposited as it has paid without receiving valid directions to make. The bank is from necessity responsible for any omission to discover the original terms and conditions of a check once properly drawn upon it, because at the time of payment it is the only party interested in protecting its integrity who has the opportunity of inspection, and it therefore owes the duty to its depositors of guarding the fund intrusted to it from spoliation. This liability arises although an alteration of a material part of his order has been effected, even though it be done so skillfully as to defy detection by examination (Daniels on Neg. Inst., sec. 1660). This follows from the fact that after it is put in circulation it passes beyond the reach of its maker, and he has no opportunity, until after it has fulfilled its office, of inspecting it and protecting himself from the loss occasioned by a fraudulent alteration. This opportunity the banker has, and he is responsible for any want of vigilance in detecting the alteration of an order after it has once been correctly drawn, with its blank places properly filled up, and is put in circulation by the maker.

The responsibility of the banker, however, for the exercise of such vigilance, is confined to the maker alone. So far as other parties through whose hands an altered check passes are concerned, they have the same opportunity for detecting fraudulent alterations in the body of the check that the banker has, and as to them, after payment, he is responsible only for the genuineness of the maker's signature (Bank of Commerce *v.* Union Bank, 3 N. Y., 230). The principle stated in White *v.* Continental Bank (64 N. Y., 316), Marine National Bank *v.* National City Bank (59 N. Y., 67) and kindred cases, that the drawers of a check or bill are held to a knowledge of the signature only of their correspondents, the drawers, and not for a want of knowledge of

the genuineness of the body of the instrument, applies only as between them and such other parties as have equal opportunity of inspection and equal means for determining the existence of an alteration. Such parties take the paper, relying solely upon the reputed responsibility of their transferers and the other parties to it, and its apparent genuineness, and they therefore deal in it at their peril. They have no duty to perform in respect to it, except that of guarding their own interests, and in buying and transferring it to others they take the risk of loss occurring from fraudulent alterations.

The questions arising on such paper between drawee and drawer, however, always relate to what the one has authorized the other to do. They are not questions of negligence or of liability of parties upon commercial paper, but are those of authority solely. In this view it has been held, when the check of a depositor was fraudulently altered from £3 to £260, after issue, and was paid by the bank at the latter amount, that the bank was entitled to charge only £3 to the depositor (Hall *v.* Fuller, 5 B. & C., 750). Bailey, *J.*, said: "If the banker unfortunately pays money belonging to the customer upon an order not genuine he must suffer, and to justify the payment he must show that the order was genuine, not in signature only but in every respect."

The question of negligence cannot arise unless the depositor has, in drawing his check, left blanks unfilled, or by some affirmative act of negligence has facilitated the commission of a fraud by those into whose hands the check may come (Young *v.* Grote, 4 Bing., 253; Daniels on Neg. Inst., sec. 1659).

The theory that a party who makes and issues commercial paper, properly and carefully drawn to express the liability which he intends to assume, is charged with negligence on account of the criminal act of another in altering

it after its issue, would render him an insurer against such acts, and is repugnant to justice and reason.

In the present case the plaintiff, on the 20th of April, intending to be absent from his place of business for a few days, drew his check on the defendant, dated April 22d, for $700, payable to his clerk, one Morgan, for the purpose of enabling him to obtain funds to pay wages becoming due to the drawer's employees on the 22d. The check was left in the drawer's check-book in his safe, with directions to Morgan, who had a key to the safe, to take the check on the 22d, draw the money and deliver it to his foreman to pay out to the employees in case the drawer did not return before noon upon that day. The plaintiff did not return until after the time appointed, but on the 21st Morgan took the check and, having altered the date to the 21st, drew the money from the bank and absconded with the funds on the same day.

The check as drawn conferred no authority on the bank to pay the amount for which it was drawn out of the plaintiff's funds before its date (Godin *v.* Bank Commonwealth, 6 Duer, 76; Mohawk Bank *v.* Broderick, 10 Wend., 304; *id.*, 13 Wend., 133). Such payment did not therefore justify the bank in charging the check to the plaintiff. The bank undoubtedly had the same right as any other person to purchase a post-dated check and enforce it against the drawer in case of his liability thereon. This right to enforce payment, however, depended upon the question as to whether the purchaser became a *bona fide* holder of the paper, and also whether it was then a valid obligation of the maker. A material alteration of its terms after execution and before payment would destroy its validity. A change in its date whereby the time of its payment was accelerated was undoubtedly such an alteration. Thus it was held in the case of Vance *v.* Lowther (1 L. R. Ex. Div., 176), where the date of a check had been altered from March 2d to March 26 and as thus altered was attempted

to be enforced against the drawer by one who had paid value to an unlawful holder for it, that such alteration vitiated the check and no recovery could be had thereon.

Whenever the legal rights and liabilities of a maker of commercial paper are changed in a material respect by a fraudulent alteration of the obligation, such alteration vitiates the instrument, and the question whether it is material or not is one of law for the Court (2 Parsons on Notes and Bills, 582; 2 Parsons on Con., 721; Daniels on Neg. Inst., secs. 1373, 1658; Booth *v.* Powers, 56 N. Y., 29).

The absence of a date upon a negotiable instrument at its inception, or the fact that it is past or antedated, may not be material upon the question of its validity, but when a date has been once inserted and its time of payment has been thus fixed, such date is material and cannot be altered without the consent of the maker (Daniels on Neg. Inst., 1376–77, 1577–78; 2 Parsons on Notes, 552; Stephen *v.* Graham, 7 Serg. & R., 505).

In the present case the check was never a valid instrument for any purpose, because it had become vitiated by a fraudulent alteration before it had any inception. It never came into the hands of any person entitled to enforce it for any amount or for any purpose as against its maker. The whole object of the check had failed before the legally appointed time for its payment by reason of the unauthorized act of the bank in paying it and thereby enabling the fraudulent holder to abscond with its proceeds. The check was not therefore a legal obligation enforceable against the drawer by its owner and holder.

It is claimed by the appellant that even if it be held that the defendant had no authority to pay this check on the 21st, that having become its owner, and having kept it until after its true date, it was then entitled to charge it to the plaintiff because it then corresponded, not only as to amount, but as to the time of payment, with the obligation which the plaintiff intended to, and did in fact, assume.

There is some authority for the proposition that a banker, after payment, has the right to hold an altered check for its correct amount as against the maker (Hall *v.* Fuller, *supra :* Susquehanna Bank *v.* Loomis, 85 N. Y., 207; Redington *v.* Wood, 45 Cal., 406). In these cases, however, the checks had received a legal inception upon their delivery to holders for value, and, as thus delivered, authorized their drawees to pay them and debit the makers with the sum originally specified therein. Such instruments not only conferred authority to pay their true amount upon their drawees, but created a legal liability in case of non-payment against their drawees for the repayment of that amount, and the right to enforce such power or liability would, no doubt, pass as an incident to the transfer of the check to any holder in good faith (Parsons on Bills and Notes, 582).

But we cannot see how the principle stated in those cases can benefit the defendant, for the possibility that the check would ever become a legal liability in the hands of any person was destroyed by its fraudulent alteration before inception. In the hands of Morgan the check created no liability in his favor against its drawer. There never existed, therefore, either a valid written obligation against the plaintiff or an original legal liability to any one enforceable after the destruction of the written instrument by its fraudulent alteration. The transfer of the check by Morgan, under the circumstances, could not, therefore, carry to another a right founded either upon the vitiated check or upon an original liability which never in fact existed.

When a negotiable instrument constitutes in itself the only obligation existing against its maker, all remedies thereon are lost by its fraudulent alteration, and the law refuses to create a new contract to supply the place of the one destroyed (Booth *v.* Powers, 56 N. Y., 31 ; Parsons on Bills, 572 ; Meyer *v.* Hunecke, 55 N. Y., 412).

It follows that there is no principle upon which the defendant has the right to charge the check in question for any amount to the plaintiff.

The judgment should, therefore, be affirmed.

All concur.

Decided October 6, 1885."

JOHN M. BOWERS,
For Defendants in Error.